

NOTES

FEDERAL JURISDICTION: THE CIVIL RIGHTS REMOVAL STATUTE REVISITED

It is a riddle wrapped in a mystery inside an enigma.†

For the first time in sixty years, the Supreme Court in Georgia v. Rachel and City of Greenwood v. Peacock re-examined the civil rights removal provisions of section 1443 of the Judicial Code, which until recent years have remained dormant because of the restrictive interpretation assigned to this remnant of Reconstruction legislation. The Supreme Court as late as 1906 apparently relegated the statute's principal remedy to instances involving a state enactment discriminatory on its face, a standard which rendered the legislation impotent as more subtle devices for denying equal civil rights developed. However, when the Civil Rights Act of 1964 provided a new opportunity for the Court to re-examine the obscure textual language of section 1443, the resulting re-evaluation produced a restrictive construction which apparently permits removal in only one additional and narrowly circumscribed circumstance, probably foreclosing all other channels for invoking this remedy.

THE CONSTITUTIONAL authority for Congress to ordain and establish inferior federal courts¹ made virtually inevitable the continuing struggle to define the jurisdictional balance between the state and federal tribunals.² The primary considerations in this evolving

† Sir Winston L. S. Churchill, radio broadcast, London, October 1, 1939, reprinted in *THE WISDOM OF WINSTON CHURCHILL* 320 (1956).

¹ "The Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court. . . ." U.S. CONST. art. I, § 8[9]. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Thus, Congress was given the responsibility and discretion to balance the jurisdictional power between the federal and state courts. See *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359-80 (opinion of Court by Frankfurter, J.), 389-412 (separate opinion by Brennan, J.) (1959); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346-52 (1816). See generally FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 1-14 (1927) [hereinafter cited as FRANKFURTER & LANDIS].

² See generally FRANKFURTER & LANDIS; HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953) [hereinafter cited as HART & WECHSLER]; MASON & BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* (1959) [hereinafter cited as MASON & BEANEY]; WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1923); WENDELL, *RELATIONS BETWEEN THE FEDERAL AND STATE COURTS* (1949); *THE FEDERALIST* (Lodge ed. 1888);

conflict are the just and efficacious adjudication of local matters under the states' judicial machinery and laws and the frequently competing obligation of the federal government, through its courts, to protect individual constitutional rights.³ Gradually, Congress has increased lower federal court jurisdiction in order to safeguard the federal constitutional and statutory rights of particular classes.⁴ Indeed, amid feelings of nationalism born of the Civil War⁵ and the strong desires of the Thirty-ninth Congress to insure the reality of the rights guaranteed by the Emancipation Proclamation and the thirteenth amendment,⁶ the Civil Rights Act of 1866⁷ provided for

Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); *Federal Courts*, 13 LAW & CONTEMP. PROB. 1 (1948); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft, No. 4, 1966).

³ "Although the protection of federally-granted rights was a primary purpose for the establishment of a system of federal courts, the principle established by the first Judiciary Act was that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme Court. In the course of time, exceptions were made in the case of matters of a peculiarly federal nature or where political exigencies demanded." HART & WECHSLER 727. See 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (1911); FRANKFURTER & LANDIS 10-11; MASON & BEANEY 1-27; THE FEDERALIST NOS. 78-82 (Hamilton).

⁴ Among the various devices that have been utilized by Congress to create federal court jurisdiction are the following: (1) federal question jurisdiction, 28 U.S.C. § 1331 (1964); (2) diversity jurisdiction, 28 U.S.C. § 1332 (1964); (3) removal jurisdiction, 28 U.S.C. §§ 1441-50 (1964); note 8 *infra*; (4) habeas corpus jurisdiction, 28 U.S.C. §§ 2241-55 (1964); and (5) injunction procedure, 28 U.S.C. §§ 2281-84 (1964); note 237 *infra*. See generally HART & WECHSLER 727-33, 1019-21, 1236-40; Frankfurter, *supra* note 2; Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216 (1948); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

⁵ "Sensitiveness to 'states' rights,' fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War." FRANKFURTER & LANDIS 64. "[I]t was not until the consolidation of national sentiment after the Civil War that the basic change was made whereby the national courts became the primary forum for the vindication of federal rights." HART & WECHSLER 727. See generally, FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 11-54 (1908) [hereinafter cited as FLACK]; NEVINS, THE EMERGENCE OF MODERN AMERICA (1927); RANDALL & DONALD, THE CIVIL WAR AND RECONSTRUCTION 566-652 (1961) [hereinafter cited as RANDALL & DONALD]; STAMPP, THE ERA OF RECONSTRUCTION (1965).

⁶ During the debates on the Civil Rights Act of 1866, Senator Lane of Indiana stated: "What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freedmen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated?" CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866) [covering 1833-1873]. See *id.* at 503 (remarks of Senator Howard); *id.* at 1115-18 (remarks of Representative

removal of cases from the state to federal courts⁸ in certain enu-

Wilson); *id.* at 1123-24 (remarks of Representative Cook). See generally FLACK 15-40. The Supreme Court has described the conditions which prompted passage of the Civil Rights Act of 1866 as follows: "It is well known that in many of the States, laws existed which subjected colored men convicted of criminal offenses to punishments different from and often severer than those which were inflicted upon white persons convicted of similar offenses. The modes of trial by jury were also different, and the right of trial by jury was sometimes denied them. It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused. These were evils doubtless which the act of Congress had in view, and which it intended to remove. And so far as it reaches, it extends to both races the same rights, and the same means of vindicating them." *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593 (1871).

⁷ Section 3 of the Civil Rights Act of 1866 provided for removal in civil rights cases. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27; note 53 *infra*. Section 3 was originally codified in REV. STAT. § 641 (1875) and is now codified at § 1443 of the Judicial Code. 28 U.S.C. § 1443 (1964); see text accompanying note 23.

⁸ The right of removal from a state to a federal court is solely of statutory origin, *Insurance Co. v. Pechner*, 95 U.S. 183, 185 (1877), and has been provided by numerous statutes for the protection of federal officers and the safeguarding of federal rights.

In the first grant of federal jurisdiction, the heatedly debated Judiciary Act of 1789, Congress provided for removal in three types of cases where it was feared national interests might be thwarted by parochial state courts. Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 79. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 805-06 n.52 (1965).

Removal of suits against customs officers for acts in performance of their duties was provided to guard against the hostility generated by the resistance to the War of 1812. See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198; Act of March 3, 1815, ch. 94, § 6, 3 Stat. 233, as amended, Act of April 27, 1816, ch. 110, § 3, 3 Stat. 315, as amended, Act of March 3, 1817, ch. 109, § 2, 3 Stat. 396. Similarly, Act of March 2, 1833, ch. 57, § 3, 4 Stat. 633, which was passed as part of the Force Act in response to South Carolina's threat to nullify federal tariff legislation, allowed removal to a federal court by those officers who were acting under the authority of the revenue laws. HART & WECHSLER 1019-20, 1147-50.

The Civil War pressures provoked a grant of federal jurisdiction in cases involving United States officers who, during the rebellion, were acting "by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress . . ." Habeas Corpus Suspension Act of 1863, ch. 81, § 5, 12 Stat. 756, as amended, Act of May 11, 1866, ch. 80, § 3, 14 Stat. 46, as amended, Act of Feb. 5, 1867, ch. 27, 14 Stat. 385, as amended, Act of Jan. 22, 1869, ch. 13, 15 Stat. 267. Also growing out of the Civil War tensions was a series of enactments which granted removal to United States officials in cases against them arising from their enforcement of the internal revenue laws. Act of March 7, 1864, ch. 20, § 9, 13 Stat. 17, as amended, Act of June 30, 1864, ch. 173, § 50, 13 Stat. 241, as amended, Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. See FRANKFURTER & LANDIS 61-63 n.22. In the period following the Civil War federal court jurisdiction was increased by various other enactments. *Ibid.* Of major significance is the Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, which provided for removal in various situations in which Congress attempted to protect certain enumerated rights. See note 10 *infra*.

Federal removal jurisdiction was widened significantly by the Act of March 3, 1875, ch. 137, 18 Stat. (Pt. 3) 470, under which the federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the

merated instances⁹ where Congress feared the abridgment of certain specific rights.¹⁰

The mechanism for the invocation of the removal procedure was explicitly detailed in the 1866 Act.¹¹ Unfortunately, this precision was diminished in the *Revised Statutes* (1875), in which minor and

primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States. Thereafter, any suit asserting such a right could be begun in the federal courts; any such action begun in a state court would be removed to the federal courts for disposition." FRANKFURTER & LANDIS 65. See HART & WECHSLER 763 & n.1.

In 1875 various removal procedures were codified at REV. STAT. §§ 639-47 (1875). As part of the revision of 1911, these sections were repealed, Judicial Code of 1911, ch. 231, § 297, 36 Stat. 1168, and then re-enacted in substance, Judicial Code of 1911, ch. 231, §§ 28-39, 36 Stat. 1094. Various removal provisions are presently codified at 28 U.S.C. §§ 1441-44 (1964). See generally HART & WECHSLER 1019-51.

⁹ Section 3 of the Civil Rights Act of 1866 provided for removal in three types of civil and criminal cases: (1) when a defendant "is denied or cannot enforce" in the state courts certain "equal civil rights" (now 28 U.S.C. § 1443 (1) (1964)) (see notes 175-255 *infra* and accompanying text); (2) when any officer "or other person" is prosecuted for acts performed under color of authority of the 1866 Act and the Freedmen's Bureau legislation (now U.S.C. § 1443 (2) (1964)) (see notes 50-69 *infra* and accompanying text) and (3) when any officer "or other person" is prosecuted for his refusal to perform certain acts upon the ground that they would be inconsistent with the 1866 Act (now 28 U.S.C. § 1443 (2) (1964)) (see notes 70-75 *infra* and accompanying text).

¹⁰ The rights to be protected by the removal remedy were contained in Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. §§ 1977-78 (1875), 42 U.S.C. §§ 1981-82 (1964)), which read in part:

"[All United States] citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

See notes 82-83 *infra* and accompanying text.

¹¹ Section 3 of the Civil Rights Act of 1866, see note 53 *infra*, provided that the removal remedies were to be utilized according to the procedure employed by the Habeas Corpus Suspension Act of 1863, ch. 81, § 5, 12 Stat. 756, as amended by Act of May 11, 1866, ch. 80, § 3, 14 Stat. 46. See note 8 *supra*. The 1863 Act, as amended, permitted removal both before trial and after judgment. The 1866 amending act limited the before-trial procedure to allow removal only prior to the time the jury was impaneled in the state court, while the post-judgment procedure was unaltered. Therefore, it appears that the enacting legislators of the 1866 Civil Rights Act envisioned defendants using both the before-trial and post-judgment channels for removal purposes. In 1870 post-judgment removal of civil cases tried by a jury was invalidated on seventh amendment grounds. *McKee v. Rains*, 77 U.S. (10 Wall.) 22 (1870); *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870). All remaining forms of post-judgment removal were eliminated in the 1875 revision when the revisers without explanation provided for removal only when the petition was filed "at any time before trial or final hearing of the cause." REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)).

supposedly innocuous alterations in phraseology¹² and a major unexplained change in procedure¹³ were made in the removal provisions. Although this revision was the result of the limited authorization to consolidate and simplify existing statutes,¹⁴ the unexplained modifications pose severe problems of statutory construction with profound implications for operational federalism. Furthermore, little interpretive assistance is provided by the ambiguous legislative history of the original removal provision in the 1866 Act.¹⁵ Between 1880 and 1906, the Supreme Court, in nine cases¹⁶ frequently referred to as the *Strauder-Powers* decisions, rendered a restrictive interpretation of the scope of the removal remedy; thus, removal was allowed only if the petitioner could rely on an extant state law discriminatory either on its face or as interpreted by the highest state court.¹⁷ Until recently this narrow construction was not subjected to rigorous judicial re-evaluation, primarily because the power of the courts of appeal to review district court orders remanding re-

¹² Of the various alterations in phraseology in the 1875 revision (see notes 57, 63, 76, 88, 176, 181 *infra*), the most significant was the unexplained substitution of general language for a specific reference in denoting the rights to be protected by the removal procedure now codified as subsection 1 (see note 88 *infra* and accompanying text) and subsection 2 (see note 76 *infra* and accompanying text) of 28 U.S.C. § 1443 (1964).

¹³ The Civil Rights Act of 1866 provided for removal both before trial and after judgment. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (1964)); see note 11 *supra*. In the 1875 revision, the channel of post-judgment removal was dropped without explanation. See note 14 *infra* and accompanying text.

¹⁴ Acting in accordance with statutory authority, President Andrew Johnson appointed a commission "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in nature." Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74. Immediately prior to the revision's enactment into positive law, several statements were made in Congress to the effect that, although changes in phraseology were necessary, the substantive law was not altered by the revision. See, e.g., CONG. GLOBE, 43d Cong., 1st Sess. 646-48, 1029, 1210, 1461 (1874) [covering 1833-1873] (remarks of Representative Poland). But see *United States v. Price*, 383 U.S. 787, 803 & n.12 (1966); *Amsterdam*, *supra* note 8, at 870-74. See generally Dwan & Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1013-15 (1938).

¹⁵ See note 178 *infra*.

¹⁶ *Kentucky v. Powers*, 201 U.S. 1 (1906); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1881); *Virginia v. Rives*, 100 U.S. 313 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880). See also *Schmidt v. Cobb*, 119 U.S. 286 (1886); *Dubuclet v. Louisiana*, 103 U.S. 550 (1881).

¹⁷ E.g., *Kentucky v. Powers*, *supra* note 16; *Gibson v. Mississippi*, *supra* note 16; *Bush v. Kentucky*, *supra* note 16; *Neal v. Delaware*, *supra* note 16; *Virginia v. Rives*, *supra* note 16. See notes 183-201 *infra* and accompanying text. See generally *Amsterdam*, *supra* note 8, at 843-50; Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443*, 26 FED. B.J. 99, 136-39 (1966); Morse, *Civil Rights Removal: "The Letter Killeth, But the Spirit Giveth Life,"* 11 HOW. L.J. 149, 155-74 (1965); Comment, 44 N.C.L. REV. 380, 385-89 (1966).

removal cases to the state courts had been eliminated in 1887.¹⁸ After the Civil Rights Act of 1964 reinstated this appellate review procedure,¹⁹ conflicting pronouncements on the scope of the removal statute were rendered by various courts of appeals.²⁰ On the last day of the 1965 Term, the Supreme Court, in *Georgia v. Rachel*²¹ and *City of Greenwood v. Peacock*,²² considered and rejected an expansive and revolutionary construction of the removal remedy, which is presently codified in section 1443 of the Judicial Code and reads as follows:

¹⁸ Before 1875, a remand order was viewed as an interlocutory order, not a "final judgment." Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1189-90 & n.108 (1963). Consequently, the appropriate remedy for review was by a writ of mandamus (now 28 U.S.C. § 1291 (1964)), not by an appeal. See *Chicago & A.R.R. v. Wiswall*, 90 U.S. (23 Wall.) 507 (1875). In 1875 a federal court order dismissing or remanding a case to a state court was made appealable by writ of error or appeal to the Supreme Court. Act of March 3, 1875, ch. 137, § 5, 18 Stat. (Pt. 3) 472; HART & WECHSLER 1019-21. However, the reviewability of federal court remand orders was extinguished in 1887. Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553, as amended, Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 435. The appeal of remand orders in civil rights removal cases was barred between 1887 and 1964, *Georgia v. Rachel*, 384 U.S. 780, 786 & n.6 (1966), notwithstanding the notation by some commentators that § 5 of the 1887 Act, as amended, provided "saving clauses" so that the removal procedures presently codified at 28 U.S.C. § 1443 (1964) and other designated statutes would be exempt from the elimination of reviewability of remand orders. Amsterdam, *supra* note 8, at 832 n.173, 848 n.217; Lusky, *supra* at 1189-90 n.108. In any event, the appealability of remand orders was reinstated by 28 U.S.C. § 1447 (d) (1964) (originally enacted as Civil Rights Act of 1964, § 901, 78 Stat. 266) (see note 19 *infra*); Note, 43 N.C.L. REV. 628 (1964). This provision has been upheld by recent court of appeals' decisions, see, e.g., *New York v. Galamison*, 342 F.2d 255, 257 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965), and by the United States Supreme Court, see *Georgia v. Rachel*, *supra* at 786-87 & n.7.

¹⁹ 28 U.S.C. § 1447 (d) (1964) (originally enacted as Civil Rights Act of 1964, § 901, 78 Stat. 266) provides in part: "an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." There is substantial indication in the legislative history that Congress enacted § 1447 (d) to provide an opportunity for the appellate courts to reinterpret the *Strauder-Powers* cases. See, e.g., 110 CONG. REC. 2770, 2773 (1964) (remarks of Representative Kastenmeier, who favored lifting the appeal bar to remand orders); *id.* at 2771-73 (remarks of Representative Dowdy, who was opposed to lifting the appeal bar); *id.* at 6551 (remarks of Senator Humphrey); *id.* at 6564 (remarks of Senator Kuchel); *id.* at 6955-56 (remarks of Senator Dodd).

²⁰ Compare *Baines v. City of Danville*, 357 F.2d 756 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966), and *Wallace v. Virginia*, 357 F.2d 105 (4th Cir.), *aff'd mem.*, 384 U.S. 891 (1966), with *Peacock v. City of Greenwood*, 347 F.2d 679 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966), and *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966). See Johnson, *supra* note 17, at 139-49; Note, 44 N.C.L. REV. 1152 (1966); 44 TEXAS L. REV. 200 (1965); notes 95-96, 146, 194 *infra* and accompanying text.

²¹ 384 U.S. 780 (1966).

²² 384 U.S. 808 (1966).

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.²³

The *Rachel* case arose in 1963 when certain individuals sought service at privately owned hotels, cafeterias, and restaurants in Atlanta, Georgia.²⁴ They were arrested and indicted under a state anti-trespass statute for refusing to leave the premises upon request of the person in charge.²⁵ Thereupon, the defendants sought removal of their prosecutions to the federal district court, alleging that they had been denied rights under the first²⁶ and fourteenth²⁷ amendments.²⁸ More specifically, they asserted that their arrests "had been 'effected for the sole purpose of aiding, abetting, and perpetuating [the] customs [of] . . . serving and seating of members of the Negro race in . . . places of public accommodations and convenience upon a racially discriminatory basis . . .'"²⁹ and that they would be unable to obtain a fair trial in the state courts.³⁰ Rejecting the contention of the State of Georgia that the appeal taken from the federal district court's decision was untimely,³¹ the Supreme Court held

²³ 28 U.S.C. § 1443 (1964).

²⁴ 384 U.S. at 782-83; Brief for Appellants, pp. 1-2, *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966); Brief for Petitioner, pp. 7-8, *Georgia v. Rachel*, 384 U.S. 780 (1966).

²⁵ "It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. . . ." GA. CODE ANN. § 26-3005 (Supp. 1965).

²⁶ U.S. CONST. amend. I.

²⁷ U.S. CONST. amend. XIV.

²⁸ *Rachel v. Georgia*, 342 F.2d 336, 339 (5th Cir. 1965), *aff'd*, 384 U.S. 780, 783-84 (1966); see Brief for Appellants, pp. 2, 47, *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966).

²⁹ 384 U.S. at 783; Brief for Appellants, p. 2, *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966). See 51 IOWA L. REV. 773 (1966).

³⁰ 384 U.S. at 784; Brief for Appellants, pp. 49-58, *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966).

³¹ The State of Georgia argued that the ten-day limitation of rule 37 (a) (2) of the Federal Rules of Criminal Procedure barred the defendants' appeal filed sixteen days

that in light of the retroactive application of sections 201-03 of the Civil Rights Act of 1964,³² the removal petitions had alleged facts which, if proven to be true, would be sufficient for removal under subsection 1 of section 1443.³³

after the remand order of the District Court. Brief for Petitioner, pp. 13-16, *Georgia v. Rachel*, 384 U.S. 780 (1966). The Supreme Court rejected the state's contention, stating that rule 37 (a) (2) was not applicable to appeals from remand orders taken prior to verdict. *Georgia v. Rachel*, *supra* at 784-85 n.2. Under a 1940 authorization to promulgate procedural rules with respect to federal proceedings in criminal cases prior to and including verdict, Act of June 29, 1940, ch. 445, 54 Stat. 688, as amended, 18 U.S.C. § 3771 (1964), the Supreme Court submitted only rules 1-31 and 40-60 to Congress as was required before the rules could become effective. 327 U.S. 821, 824 (1946); Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 230, 237-38 (1947). Therefore, the Supreme Court in *Rachel* concluded that the ten-day limitation of rule 37 (a) (2) does not apply to an appeal from a remand order taken prior to verdict. 384 U.S. at 784-85 n.2.

³² "Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

....

"Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

"Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." Civil Rights Act of 1964, §§ 201-03, 78 Stat. 243, 42 U.S.C. §§ 2000a to a-2 (1964).

³³ The Civil Rights Act of 1964, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.), was enacted after the defendants in *Rachel* had filed their removal petitions but before the disposition of their appeal from the remand order. 384 U.S. at 784-85. In *Hamm v. City of Rock Hill*, 379 U.S. 306 (1965), the Supreme Court declared that "since the Civil Rights Act [of 1964] substitutes a right for a crime any state statute, or its application, to the contrary must by virtue of the Supremacy Clause give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity." *Id.* at 315. See 1965 DUKE L.J. 640; 79 HARV. L. REV. 132 (1965); 50 IOWA L. REV. 1254 (1965). Therefore, the Supreme Court in *Rachel* concluded that, if the defendants' allegations were proven to be true, removal should be granted since *Hamm* "held that the [Civil Rights Act of 1964] . . . precludes state trespass prosecutions for peaceful attempts to be served upon an equal basis in establishments covered by the Act, even though the prosecutions were instituted prior to the Act's passage." 384 U.S. at 785.

There remained the question of whether or not the removal petition contained allegations of denials sufficient to invoke the rights under the 1964 Act. A removal petition is required to contain "a short and plain statement of the facts which entitles" one to removal. 28 U.S.C. § 1446 (a) (1964). *Rachel* concluded that since "the removal petition may fairly be read to allege that the defendants will be brought to trial solely as the result of peaceful attempts to obtain service at places of public accommodation," the defendants' allegations were sufficient to invoke a right under the 1964 Act. 384 U.S. at 793 & n.21.

In the *Peacock* case, twenty-nine persons who were engaged in several voter registration drives and civil rights activities in Mississippi in 1964 were arrested and indicted on various criminal charges.³⁴ Those defendants sought removal under both subsections 1 and 2 of section 1443. Attempting to qualify under subsection 1, the removal petitions alleged denial of various rights under the first and fourteenth amendments. The petitioners asserted that the charges against them were unconstitutional applications of state laws in that prosecutions were initiated for the purpose of harassing the petitioners in their civil rights activity;³⁵ the petitioners also alleged that they would be unable to obtain a fair trial in the state courts of Mississippi.³⁶ In addition, the defendants sought removal under subsection 2. They claimed that the fact that their prosecutions emanated from the peaceful exercise of their rights under the first and fourteenth amendments and various sections of the Civil Rights Acts of 1866,³⁷ 1870,³⁸ and 1957³⁹ was sufficient to fulfill the requisites

³⁴ The fourteen defendants in *Peacock* were charged with obstructing the public streets of the City of Greenwood, Mississippi, in violation of Miss. CODE ANN. § 2296.5 (Supp. 1964); see Brief for Cross-Petitioner, p. 5, Brief for Petitioner, p. 5, City of Greenwood v. Peacock, 384 U.S. 808 (1966).

Each of the fifteen defendants in a companion case, *Weathers v. City of Greenwood*, 347 F.2d 986 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966), were charged with at least one of the following violations of state and local legislation: parading without a permit; contributing to the delinquency of a minor; the use of profane and vulgar language; disturbance in a public place; disturbing the peace; assault; assault and battery; inciting to riot; operating a motor vehicle with improper license tags; interfering with a police officer in the performance of his duty; and reckless driving. Brief for Petitioner, p. 7, City of Greenwood v. Peacock, *supra*. See City of Greenwood v. Peacock, *supra* at 812-13 & n.5; Brief for Cross-Petitioner, pp. 6-7, City of Greenwood v. Peacock, *supra*; 44 TEXAS L. REV. 200 (1965).

³⁵ 384 U.S. at 810-14; Brief for Petitioner, p. 6, Brief for Cross-Petitioner, pp. 5-6, 9-11, City of Greenwood v. Peacock, 384 U.S. 808 (1966).

³⁶ 384 U.S. at 813 & n.6; Brief for Petitioner, pp. 6-8, Brief for Cross-Petitioner, p. 7, 9-11, City of Greenwood v. Peacock, 384 U.S. 808 (1966).

³⁷ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. §§ 1977-78 (1875), 42 U.S.C. §§ 1981-82 (1964)). See note 10 *supra*.

³⁸ Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 (now REV. STAT. § 2004 (1875), 42 U.S.C. § 1971 (a) (1) (1964)) provided in part: "[A]ll citizens of the United States who are or shall be otherwise qualified by law to vote at any election . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

³⁹ Civil Rights Act of 1957, § 131, 71 Stat. 637, 42 U.S.C. § 1971 (b) (1964) provides in part: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives. . . ."

for removal under subsection 2.⁴⁰ The Supreme Court, however, disallowed removal on the grounds that the petitions failed to allege facts sufficient to obtain removal under either subsection 1⁴¹ or 2⁴² of section 1443.

In *Rachel* and *Peacock*, the Supreme Court adjudicated issues embodied in both subsections of section 1443. Although the two subsections present the common interpretive problem as to which "rights" are to receive removal procedure protection, they emphasize different aspects of the remedial device.⁴³ That is, the thrust of subsection 1 is the *denial* of certain rights,⁴⁴ while the concern under subsection 2 is the particular *conduct* in which the defendant was engaged.⁴⁵ This note will attempt to delineate the resolutions of the major statutory issues confronted by *Rachel* and *Peacock*⁴⁶ by focusing on the ambiguous construction of the statute,⁴⁷ on the practical policy considerations relevant to the remedy's implementation,⁴⁸ and on the no less important concept of operational federal-

⁴⁰ See 384 U.S. at 814-15; Brief for Cross-Petitioner, pp. 11-23, *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

⁴¹ See notes 175-255 *infra* and accompanying text.

⁴² See notes 50-75 *infra* and accompanying text. See Note, 51 VA. L. REV. 950 (1965).

⁴³ Any decision to allow removal under the terms of subsection 1 would involve grappling with the generic phrase "any law providing for . . . equal civil rights." 28 U.S.C. § 1443 (1) (1964). (Emphasis added.) See notes 81-113 *infra* and accompanying text; *Amsterdam*, *supra* note 8, at 863-74; *Johnson*, *supra* note 17, at 105-28. Removal according to the requirements of subsection 2 poses an identical problem in the markedly similar generic phrase "any law providing for equal rights." 28 U.S.C. § 1443 (2) (1964); see notes 76-80 *infra* and accompanying text. See *New York v. Galamison*, 342 F.2d 255, 264, 271 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965); Comment, 1965 U. ILL. L.F. 100, 109-10 (1965).

⁴⁴ From its original enactment in the Civil Rights Act of 1866 (see note 53 *infra*) through the 1875 revision (see note 176 *infra*) and up to and including its present codification (see text accompanying note 23 *supra*), § 1443 (1) has concerned itself with removal by a defendant who "is denied or cannot enforce in the courts of such State" certain equal civil rights. See notes 175-255 *infra* and accompanying text.

⁴⁵ Subsection 2 allows removal for a defendant who has performed "any act[s] under color of authority derived from any law providing for equal rights . . ." or has "refus[ed] to do any act on the ground that it would be inconsistent with such law." 28 U.S.C. § 1443 (2) (1964). See notes 50-75 *infra* and accompanying text.

⁴⁶ For discussion of the issues embodied in subsection 1, see notes 81-113, 175-255 *infra* and accompanying text; for the presentation of issues posed by subsection 2, see notes 50-80 *infra* and accompanying text.

⁴⁷ See notes 55-57, 70, 73, 76-77, 87-88, 146, 175, 198, 203 *infra* and accompanying text.

⁴⁸ For example, the criteria for removability should be formulated so as to negate the inherent vulnerability of the removal procedure to manipulation as a delaying tactic since the correct filing of the removal petition stays all state court proceedings until acted upon by the federal court. 28 U.S.C. § 1446 (e) (1964). See notes 264-65 *infra* and accompanying text. Moreover, the evidentiary hearing on the substantiality

ism.⁴⁹ We shall commence with a consideration of subsection 2, which, prior to *Rachel* and *Peacock*, had never been subjected to scrutiny by the Supreme Court and only recently has received significant attention by lower federal courts.⁵⁰

SUBSECTION 2: "AUTHORITY CLAUSE" AND "REFUSAL CLAUSE"

The interpretative problems posed by subsection 2 were considered only in the *Peacock* opinion,⁵¹ in which the Supreme Court focused almost exclusively on the subsection's first clause—commonly denominated the "authority clause"—which permits removal of civil actions or criminal prosecutions "for any act under color of authority derived from any law providing for equal rights . . ."⁵² The essence of this procedure has remained intact since its original enactment in the Civil Rights Act of 1866,⁵³ with the various revisions making only

of the removal petition conducted by the federal court should be such that disposition can be accomplished within a reasonable amount of time. See notes 235, 274-78 *infra* and accompanying text. These two considerations coupled with the potential number of cases that might be removed are directly related to the important task of avoiding the disruption of the state judicial processes and injurious congestion in the federal courts. See notes 264-65, 274-75 *infra* and accompanying text; Note, 51 VA. L. REV. 950, 967 & n.72 (1965).

⁴⁹ See notes 61-69, 73-75, 197, 213-14, 261-78 *infra* and accompanying text.

⁵⁰ See, e.g., *New York v. Hutchinson*, 360 F.2d 759 (2d Cir. 1966); *Baines v. City of Danville*, 357 F.2d 756 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *Peacock v. City of Greenwood*, 347 F.2d 679 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966); *Board of Educ. v. City-Wide Comm.*, 342 F.2d 284 (2d Cir. 1965); *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965); *O'Keefe v. Board of Elections*, 246 F. Supp. 978 (S.D.N.Y. 1965); *City of Clarksdale v. Gertge*, 237 F. Supp. 213 (N.D. Miss. 1964); *Alabama v. Robinson*, 220 F. Supp. 293 (N.D. Ala. 1963); *Arkansas v. Howard*, 218 F. Supp. 626 (E.D. Ark. 1963).

⁵¹ 384 U.S. at 814-24.

⁵² 28 U.S.C. § 1443 (2) (1964).

⁵³ Section 3, which detailed the removal provisions of the Act of April 9, 1866, ch. 31, 14 Stat. 27 (now 28 U.S.C. § 1443 (1964)), provided in part:

"SEC. 3. And be it further enacted, That the district courts of the United States . . . shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof . . ."

changes in phraseology.⁵⁴ However, because the present textual formulation contains no language qualifying which class or classes of persons can invoke the procedure,⁵⁵ the Supreme Court turned to the statute's phraseology as originally enacted.⁵⁶ Section 3 of the 1866 Act provided for removal of civil and criminal suits and prosecutions brought "against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act" or the Freedmen's Bureau legislation.⁵⁷

Peacock concluded that the words "any officer . . . or other person" clearly encompassed only federal officers and those persons acting in association with them.⁵⁸ While commentators recently have argued that the words "other person" logically could have been used to denote individuals exercising their rights guaranteed by the 1866 Act on the theory that they were acting "under color of authority" of that Act,⁵⁹ *Peacock* felt a textual comparison of the original language of subsections 1 and 2 indicated clearly that the "authority clause" could not be so broadly interpreted.⁶⁰ Specifically, if Congress had not intended to restrict the "authority clause" to persons acting in an official or quasi-official capacity, it would have used

⁵⁴ See notes 57, 63 *infra*.

⁵⁵ See the statutory language of 28 U.S.C. § 1443 (1964) in text accompanying note 23 *supra*.

⁵⁶ *City of Greenwood v. Peacock*, 384 U.S. 808, 816 (1966).

⁵⁷ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (2) (1964)). (Emphasis added.) See note 53 *supra*. The description in the 1866 Act of the type of person whose case could be removed under subsection 2 was not significantly altered in the 1875 revision (see REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (2) (1964)); note 65 *infra*, in the Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096, nor in the 1926 revision, 28 U.S.C. § 74 (1926). In the 1948 revision, this description of the petitioner was deleted and replaced by the present phrase "for any act . . ." 28 U.S.C. § 1443 (2) (1964). The Reviser's Note stated that changes were made only in phraseology. H.R. REP. NO. 308, 80th Cong., 1st Sess. A134 (1947). See generally Note, 51 VA. L. REV. 950, 955-56 (1965).

⁵⁸ 384 U.S. at 815, 824. Various courts of appeals have concluded that the removal provision of the "authority clause" of subsection 2 is limited to officials and those assisting them. *E.g.*, *Baines v. City of Danville*, 357 F.2d 756, 771-72 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *City of Greenwood v. Peacock*, 347 F.2d 679, 684-86 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966). See 44 TEXAS L. REV. 200 (1965).

⁵⁹ See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 876-80 (1965). Note, 51 VA. L. REV. 950, 961-62 (1965); note 61 *infra*.

⁶⁰ 384 U.S. at 816. The original language of subsections 1 and 2 in § 3 of the Civil Rights Act of 1866 is contained in note 53 *supra*.

the words "any person" as employed in the original and present codification of subsection 1.⁶¹ Moreover, the Court believed that the words "other person" were utilized as a catchall denotation of the variously designated individuals whom the 1866 Act authorized to implement its provisions in an official or quasi-official capacity.⁶²

Furthermore, the Court felt that a restrictive view of the "authority clause" comported with the originally enacted language referring to "any arrest or imprisonment, trespasses, or wrongs."⁶³

⁶¹ *City of Greenwood v. Peacock*, 384 U.S. 808, 816 (1966). Without deciding the issue, the Court of Appeals for the Second Circuit in *New York v. Galamison*, 342 F.2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965), questioned why the words "other person" would be employed in subsection 2 as opposed to the words "any person" used in subsection 1 if "other person" was synonymous with "any person." 342 F.2d at 262. One commentator has answered this objection in the following manner: "First, the 'color of authority' clause is lifted practically unchanged from the 1863 Habeas Corpus Suspension Act. Second, in view of the language of the denial clause, 'arrest or imprisonment, trespasses, or wrongs,' the use of the phrase 'any officer . . . or other person' more strongly conveys coverage of non-officer persons than might the words 'any person' standing alone." Amsterdam, *supra* note 59, at 878 n.352. But see note 62 *infra*.

⁶² *City of Greenwood v. Peacock*, 384 U.S. 808, 816-20 (1966). *Peacock* noted that these "other persons" were given various descriptions in the enforcement provisions of the 1866 Civil Rights Act such as: "agents" in § 4; "one or more suitable persons" appointed to execute warrants in § 5; deputized "bystanders or posse comitatus" in § 5; "officer, person or persons, or those lawfully assisting them" in § 6; and "person or persons authorized to execute the process" in § 7. Act of April 9, 1866, ch. 31, §§ 4-7, 14 Stat. 28 (now REV. STAT. §§ 1982-83, 1985, 1987 (1875), 42 U.S.C. §§ 1987, 1989-91 (1964)).

After comparing the uses of the phrase in other removal provisions various commentators have concluded that "other person" in the 1866 Act might be interpreted to include private individuals. See Amsterdam, *supra* note 59, at 877-78 & n.347; Comment, 1965 U. ILL. L.F. 100, 108; Note, 51 VA. L. REV. 950, 956 & n.29, 961-62 (1965). Specifically, since the scope of the words "other person" in the Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198, Act of March 3, 1815, ch. 94, § 6, 3 Stat. 233, and Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171, was clearly defined by limiting words, the mere words "other person" of the 1866 Act should be construed to include any defendant. But see Act of March 2, 1833, ch. 57, § 3, 4 Stat. 633; Act of Feb. 28, 1871, ch. 99, § 16, 16 Stat. 438. *Peacock* acknowledged these alternative uses of the phrase "other person." 384 U.S. at 820-21 n.17, 823 n.20. However, noting that the Act of March 2, 1833, ch. 57, § 3, 4 Stat. 633, used the words "other person" and clearly indicated that private persons might come under its removal provisions, *Peacock* concluded that "when Congress desired to grant removal of suits and prosecutions against private individuals, it knew how to make specific provision for it." 384 U.S. at 820-21 n.17. See Act of Jan. 22, 1869, ch. 13, 15 Stat. 267, which amended the 1863 Habeas Corpus Suspension Act, specifically to allow removal to private persons in some instances. The definition of "other person" as those individuals who would be called upon to enforce the provisions of the 1866 Act in a quasi-official capacity was also advanced in recent courts of appeals decisions. *E.g.*, *Baines v. City of Danville*, 357 F.2d 756, 772 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *Peacock v. City of Greenwood*, 347 F.2d 679, 686 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966). See generally Comment, 44 N.C.L. REV. 380, 395-97 (1966).

⁶³ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (2) (1964)).

Peacock noted that these activities were precisely the ones for which federal officers were likely to be prosecuted when they attempted to enforce the guarantees of the 1866 Act.⁶⁴ The Court was also impressed by the fact that the phrases "other person" and "arrest or imprisonment, trespasses, or wrongs" had been adopted from the Habeas Corpus Suspension Act of 1863,⁶⁵ the removal provisions of which had been interpreted to be available only to officers and persons assisting them.⁶⁶ This identity of language is significant because

The phrase "arrest or imprisonment, trespasses, or wrongs" has come forward to the present codification of the "authority clause" in the abbreviated form "for any act." 28 U.S.C. § 1443 (2) (1964). See note 57 *supra* and accompanying text.

⁶⁴ 384 U.S. at 821-23. See *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965), where the court stated that "'arrest or imprisonment, trespasses, or wrongs,' were precisely the probable charges against enforcement officers and those assisting them . . ." 342 F.2d at 262. In deciding that the "authority clause" was restricted to officials and those acting under them, the Court of Appeals for the Fourth Circuit stated: "The suggested ambiguity in the reference in Section 3 to 'other persons' vanishes with a look at the enforcement sections." *Baines v. City of Danville*, 357 F.2d 756, 772 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). *Accord*, *Peacock v. City of Greenwood*, 347 F.2d 679, 686 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966).

However, one commentator has argued that another plausible deduction as to the import of the "arrest or imprisonment, trespasses, or wrongs" language would allow removal to those acting as individuals. "The Civil Rights Act of 1866 did grant extensive private privileges and immunities, including some whose exercise would foreseeably provoke state-law charges of trespasses and wrongs. Section 1, for example, gave all citizens the equal right to acquire and hold real and personal property and to full and equal benefit of all laws for the security of person and property. In the exercise of ordinary self-help measures to defend their property or resist arrest under the discriminatory Black Codes, freedmen asserting their equal rights under these sections would likely commit acts for which they might be civilly or criminally charged in the state courts." *Amsterdam, supra* note 59, at 876. See generally *Comment*, 44 N.C.L. Rev. 380, 395-97 (1966); *Note*, 51 Va. L. Rev. 950, 961-62 (1965).

⁶⁵ The Habeas Corpus Suspension Act of 1863, ch. 81, § 5, 12 Stat. 756, as amended by Act of May 11, 1866, ch. 80, § 3, 14 Stat. 46 (see note 8 *supra*), provided for removal of a suit or prosecution, civil or criminal, "against any officer, civil or military, or against any other person, for any arrest or imprisonment made, to other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress . . ."

The Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (2) (1964)), provided for removal of a suit or prosecution, civil or criminal, "against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority" of certain acts.

⁶⁶ See *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1867); *Hodgson v. Millward*, 12 Fed. Cas. 285 (No. 6568) (C.C.E.D. Pa. 1863) (facts of case detailed in *Hodgson v. Millward*, 3 Grant (Pa.) 412 (1863)), approved in *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 224 (1869); *Commonwealth v. Artman*, 3 Grant (Pa.) 436 (1863). See generally *HARR & WECHSLER* 1147-50. At the time that the provisions of the 1863 Act were extended to encompass removal of criminal suits, the emphasis was placed on the necessity to guard federal officers from state prosecutions. *CONG. GLOBE*, 37th Cong., 3d Sess., 535 (1863) [covering 1833-1873] (remarks of Senator Clark); *id.* at 537-38 (remarks of Senator Cowan).

the 1866 Act specifically incorporated the procedural mechanics of the removal device from the 1863 Habeas Corpus Act.⁶⁷ Thus, *Peacock* determined that the most plausible construction of the "authority clause" was one allowing removal only to "federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights."⁶⁸ As interpreted by *Peacock*, however, the usefulness of the "authority clause" is largely academic, for another statute allows removal to all federal officers and employees "for any act under color of [their] . . . office."⁶⁹

The issue of who may invoke the removal remedy also arises with respect to the second clause of subsection 2—commonly referred to as the "refusal clause"—which provides for removal of civil and criminal proceedings "for refusing to do any act on the ground that it would be inconsistent with" any law providing for equal rights.⁷⁰ Although *Peacock* felt the "refusal clause" was not relevant to the petitioners' case,⁷¹ the Court stated that legislative history explicitly manifested that this remedy was applicable only to the refusal of state officials to perform certain acts.⁷² By restricting subsection 2 exclusively to

⁶⁷ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (1964)). The removal provisions as originally enacted in the 1866 Act are contained in note 53 *supra* and a discussion of the procedural mechanics of the 1863 Habeas Corpus Suspension Act is contained in note 11 *supra*.

⁶⁸ 384 U.S. at 824.

⁶⁹ 28 U.S.C. § 1442 (a) (1) (1964). *Peacock* acknowledged that § 1441 (a) (1) covers almost all, if not all, cases presently removable under the "authority clause" of subsection 2. 384 U.S. at 820-21 n.17. Because of this redundancy, some commentators have urged that the "authority clause" might appropriately be expanded to include acts of private individuals. See Amsterdam, *supra* note 59, at 878; Comment, 1965 U. ILL. L.F. 100, 108; Note, 51 VA. L. REV. 950, 962 (1965). Notwithstanding the apparent overlap in the present codification of these two removal remedies, *Peacock* rejected this argument because the "authority clause" of subsection 2 and § 1442 (a) (1), as originally enacted, were not co-extensive in coverage. 384 U.S. at 820-21 n.17. Moreover, the Court noted that there appeared to be redundancy within § 1442 (a) (1) itself. *Ibid.* See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 221 n.18 (1948).

⁷⁰ 28 U.S.C. § 1443 (2) (1964). See text accompanying note 23 *supra*.

⁷¹ 384 U.S. at 824 n.22.

⁷² *Ibid.* When the "refusal clause" was added by the House of Representatives as an amendment to the Senate version of the 1866 Act, Representative Wilson, chairman of the House Judiciary Committee, said: "I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to [the rights contained in § 1 of the 1866 Act] . . . on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws." CONG. GLOBE, 39th Cong., 1st Sess. 1367 (1866) [covering 1833-1873]. The Court of Appeals for the Fourth Circuit has also concluded that the "refusal clause"

those acting in an official capacity,⁷³ the Court negated the possibility that these remedies, which demand no demonstrated denial of rights as required by subsection 1,⁷⁴ would facilitate the transfer of thousands of cases to the federal courts without consideration of the competency of state courts to adjudicate federal civil rights questions.⁷⁵

SUBSECTIONS 1 AND 2: THE GENERIC PHRASE

The remaining issue under subsection 2 is the scope of the generic phrase—"any law providing for equal rights"⁷⁶—which encompasses laws providing the "color of authority" to invoke the first clause and inconsistently with which one must refuse to act in order to invoke the second clause.⁷⁷ The Court apparently viewed this

of subsection 2 was intended to be applicable only to state officers. *Baines v. City of Danville*, 357 F.2d 756, 772 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966).

⁷³ By disallowing removal to the petitioners in *Peacock* on the theory that they were not acting in an official capacity, the Supreme Court did not reach the issue of when "any officer . . . or other persons" are acting "under color of authority" within the meaning of subsection 2. It has been suggested that the term "color of authority" in the context of removal means no more than that "any officer . . . or other persons" seeking removal must demonstrate that the acts for which they are being prosecuted were colorably authorized by a "law providing for equal rights." See *Amsterdam*, *supra* note 59, at 874-80. The issue of whether the defendant was acting within the bounds of his authorization and thereby engaging in protected conduct will be determined by the federal court once removal has been secured. For various interpretations of the term "color of authority," see *New York v. Galamison*, 342 F.2d 255, 264-66 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965); *Amsterdam*, *supra* note 59, at 880-82; Note, 51 VA. L. REV. 950, 963-70 (1965). The possibility suggested by the Court of Appeals for the Second Circuit in *Galamison*, 342 F.2d at 270, and expounded upon by commentators (see Comment, 44 N.C.L. REV. 380, 397 (1966); 1965 U. ILL. L.F. 100, 107; Note, 51 VA. L. REV. 950, 964-66 & nn.68-69 (1965)) that the self-help provisions of §§ 201-03 of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§ 2000a to a-2 (1964), might grant the requisite "color of authority" for private persons attempting to exercise their rights under the 1964 Act was eliminated when *Peacock* conclusively determined that the "authority clause" of subsection 2 was restricted to officers and those acting under them. 384 U.S. at 816-24.

⁷⁴ See *New York v. Galamison*, 342 F.2d 255, 264, 272 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965).

⁷⁵ See Note, 51 VA. L. REV. 950, 966-67 (1965).

⁷⁶ 28 U.S.C. § 1443 (2) (1964). The language of subsection 2 as originally enacted in § 3 of the 1866 Act (note 53 *supra*) was changed significantly in the 1875 revision regarding the designation of which rights were encompassed within its removal provisions. The reference to the 1866 Act and the Freedmen's Bureau legislation was replaced by the present generic phrase "any law providing for equal rights." REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (2) (1964) (see text accompanying note 23 *supra*)). However, no intended change in substance was announced. See note 14 *supra*.

⁷⁷ See *New York v. Galamison*, 342 F.2d 255, 267 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965).

generic phrase as identical in scope to the markedly similar generic phrase contained in subsection 1.⁷⁸ Consequently, consideration of the Court's determination of what "laws" are within its ambit will be considered in the context of subsection 1,⁷⁹ the procedure of which provides some opportunity for "any person" to obtain removal.⁸⁰

In attempting to ascertain whether a removal petition states sufficient facts to qualify under subsection 1⁸¹—commonly referred to as the "denial cause"—one is initially confronted with the crucial task of deciding which *rights* must be denied or cannot be enforced before removal will be an appropriate remedy. The mechanics of this determination were relatively simple under the procedure's original language in the Civil Rights Act of 1866,⁸² which allowed removal for the denial of "rights secured . . . by the first section of this act."⁸³ Section 16 of the Civil Rights Act of 1870⁸⁴ re-enacted in somewhat expanded form the principal rights provided in the Act of 1866⁸⁵ and, in employing by reference the procedure outlined in the

⁷⁸ The generic phrase of subsection 1 reads: "any law providing for . . . equal *civil* rights." 28 U.S.C. § 1443 (1) (1964). (Emphasis added to note the one difference between the generic phrases of the two subsections.) On two occasions in *Peacock* the Court characterized the "laws" of the generic phrase of subsection 2 as laws granting "equal civil rights." 384 U.S. at 820-21 n.17, 824. The Court of Appeals for the Second Circuit reached the conclusion that the scope of the generic phrases of the two subsections was identical. *New York v. Galamison*, 342 F.2d 255, 264, 271 (2d Cir.), cert. denied, 380 U.S. 977 (1965). But see 44 TEXAS L. REV. 200, 202-03 & nn.16-18 (1965).

⁷⁹ 28 U.S.C. § 1443 (1) (1964). See notes 81-113 *infra* and accompanying text.

⁸⁰ See notes 175-255 *infra* and accompanying text.

⁸¹ See text accompanying note 23 *supra*; note 44 *supra*.

⁸² See note 53 *supra*.

⁸³ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (1) (1964)). See note 10 *supra* for an enumeration of the rights guaranteed by § 1.

⁸⁴ Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144. The subsequent history of § 16 is detailed in note 87 *infra*.

⁸⁵ Section 16 provided:

"[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void." (Emphasis denotes the rights added to those detailed in § 1 of the Act of 1866.) See note 10 *supra* and notes 87, 116-20 *infra* and accompanying text.

1866 Act, likewise denoted the specific rights for which removal would be available.⁸⁶ Unfortunately, however, the precision of this statutory scheme was considerably lessened in the *Revised Statutes* (1875). The revisers, in correlating the revision's separation of the substantive rights from the procedural sections of the 1866 and 1870 Acts,⁸⁷ deleted the aforementioned specific reference to certain enumerated rights and without explanation substituted the progenitor of today's almost identical generic phrase "a right under any law providing for . . . equal civil rights."⁸⁸

Thus, the question has emerged whether the unexplained substitution of the generic phrase did in fact broaden the range of rights previously encompassed within the removal remedy by the 1866 and 1870 Acts.⁸⁹ The *Strauder-Powers* decisions offer very limited in-

⁸⁶ "[S]ections sixteen and seventeen hereof [1870 Act] shall be enforced according to the provisions of said act [of 1866]." Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144. This reference appeared to contemplate both original action and removal procedures of the 1866 Act. See *Baines v. City of Danville*, 357 F.2d 756, 762-63 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443*, 26 FED. B.J. 99, 106-10 (1966).

⁸⁷ The principal rights granted in § 1 of the 1866 Act (see note 10 *supra*) and expanded by § 16 of the 1870 Act (see note 85 *supra*), were carried forward in the 1875 revision as REV. STAT. §§ 1977-78 (1875), 42 U.S.C. §§ 1981-82 (1964). The remaining rights, those dealing with aliens, of § 16 of the 1870 Act were carried forward as REV. STAT. § 2164 (1875), but were repealed by Act of June 27, 1952, ch. 477, § 403 (a) (1), 66 Stat. 279.

The removal procedure of the 1866 Act was carried forward as REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)). See note 53 *supra*.

⁸⁸ 28 U.S.C. § 1443 (1) (1964). The generic phrase first appeared in the 1875 revision of the removal provision as "any right secured to him by any law providing for the equal civil rights of citizens." REV. STAT. § 641 (1875). No reason was offered for the selection of this phrase and a search of the *Congressional Globe* offers no indication as to the scope of this phrase. See note 14 *supra*. However, various methods of cross-referencing were utilized to correlate the rights of certain laws with the removal procedure's revision as REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)) (see note 104 *infra*). See *Rachel v. Georgia*, 384 U.S. 780, 790-91 (1966). This wording of the 1875 revision remained intact in the Judicial Code of 1911. Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096. The 1948 revision produced the present statutory language "a right under any law providing for the equal civil rights of citizens." 28 U.S.C. § 1443 (1) (1964); see text accompanying note 23 *supra*. There was no stated intention of making substantive alterations; the Reviser's Note explicitly said that changes were only made in phraseology. H.R. REP. NO. 308, 80th Cong., 1st Sess. A134 (1947).

⁸⁹ See generally Amsterdam, *supra* note 59, at 863-74; Johnson, *supra* note 86, at 105-28; Comment, 44 N.C.L. REV. 380, 391-94 (1966); Comment, 1965 U. ILL. L.F. 100, 109-10; Note, 51 VA. L. REV. 950, 952-57 (1965). Interpretive difficulties arise because the 1875 revision was executed under the narrow mandate to revise, simplify, and consolidate existing statutes (see note 14 *supra*), while the substituted generic phrase (see note 88 *supra*) appears on its face to be susceptible of a broader interpretation than the original version (see notes 53, 83 *supra* and accompanying text). For a similar problem with another Reconstruction statute and the 1875 revision, see Comment, 1966 DUKE L.J. 415, 455, 456 & n.152.

sight into the interpretive problems posed by the generic phrase. Even though the Supreme Court alluded to rights protected by several "laws,"⁹⁰ all of the rights allegedly denied were contained in one "law," namely, the Civil Rights Act of 1866,⁹¹ which clearly was within the ambit of the generic phrase.⁹² Furthermore, primary attention was focused upon whether the alleged denials were produced by facially discriminatory state laws or by the misapplication of valid state laws,⁹³ as opposed to which rights were within the scope of the generic phrase.⁹⁴ Consequently, the *Strauder-Powers*

⁹⁰ Some of the rights and laws considered by the *Strauder-Powers* cases include the following: (1) Section 1 of the 1866 Act (see note 53 *supra*), as expanded by § 16 of the 1870 Act (see note 85 *supra*), as carried forward in REV. STAT. §§ 1977-78 (1875), 42 U.S.C. §§ 1981-82 (1964). See, e.g., *Virginia v. Rives*, 100 U.S. 313, 317-19 (1880). (2) Rights dealing with jury service as guaranteed by Act of March 1, 1875, ch. 114, § 4, 18 Stat. (Pt. 3) 336 (now 18 U.S.C. § 243 (1964)). See, e.g., *Gibson v. Mississippi*, 162 U.S. 565, 580-82 (1896); *Neal v. Delaware*, 103 U.S. 370, 385-86 (1881); *Virginia v. Rives*, *supra* at 321. (3) Thirteenth amendment. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 358-70 (1880) (Field, J., dissenting in the principal case and in *Strauder v. West Virginia*, 100 U.S. 303 (1880)). (4) Fifteenth amendment. See, e.g., *Neal v. Delaware*, *supra* at 388-93. (5) Due process clause of fourteenth amendment. See, e.g., *Virginia v. Rives*, *supra* at 317-18; *Strauder v. West Virginia*, *supra* at 307. For the alleged denial of rights by application of an ex post facto law and by the withholding of a valid pardon, see note 91 *infra*.

⁹¹ The alleged denial by misapplication of jury selection procedure was advanced in all of the *Strauder-Powers* cases. E.g., *Kentucky v. Powers*, 201 U.S. 1 (1906); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Strauder v. West Virginia*, *supra* note 90. The right to racial equality in jury selection process was explicitly guaranteed by Act of March 1, 1875, ch. 114, § 4, 18 Stat. (Pt. 3) 336 (now 18 U.S.C. § 243 (1964)). This right is implicit in the guarantee of the Act of 1866 that persons shall have the same right "to full and equal benefit of all laws and proceedings" as enjoyed by white persons. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1964)) (see note 10 *supra*). The additional assertion in *Gibson v. Mississippi*, 162 U.S. 565, 585 (1896), that there was a denial by application of an ex post facto law has been characterized as "extravagant on the merits," and the Court denied removal on grounds unrelated to the generic phrase. *Amsterdam*, *supra* note 59, at 851 n.224. Similarly, in regard to the allegation in *Kentucky v. Powers*, 201 U.S. 1, 40 (1906), of a denial by the state court not honoring a valid pardon, *Amsterdam* stated: "[T]his claim, which was dressed out in equal protection garb by allegations of discriminatory nullification of the pardon, was treated by the Court as an equal protection clause contention (to the extent that it was other than frivolous), and so adds nothing to the Court's disposition of the cognate jury-exclusion equal protection clause claim." *Amsterdam*, *supra* note 59, at 851 n.224. *Contra*, *New York v. Galamison*, 342 F.2d 255, 268-69 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965).

⁹² See note 83 *supra* and accompanying text and note 104 *infra*.

⁹³ See notes 16-17 *supra* and 183-94 *infra* and accompanying text.

⁹⁴ The lack of a definitive approach to the scope of the removal remedy and the generic phrase can be seen in *Virginia v. Rives*, 100 U.S. 313, 317-18 (1880), where the Supreme Court stated: "[I]t is necessary to understand clearly the scope and meaning of this [removal procedure] act of Congress. It rests upon the Fourteenth Amendment of the Constitution and the legislation to enforce its provisions. . . . It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. Sects.

Court never expressly grappled with the enigma of the generic phrase, thereby failing to tender a pedagogically lucid and consistent disposition.⁹⁵ Recent decisions by various courts of appeals have proffered divergent interpretations, often without illuminating discussion.⁹⁶

Against this unfavorable decisional background, the interpretive problems created by the 1875 revisers' unexplained use of the generic phrase⁹⁷ once again emerged in *Rachel* and *Peacock*, with the Supreme Court in *Rachel* attempting the major resolution of the issue. The possibility that the generic phrase encompassed only those rights specifically enumerated in the Civil Rights Acts of 1866 and 1870 was rejected by the *Rachel* Court apparently on the

1977, 1978, Rev. Stat. . . . The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

⁹⁵ Johnson, *supra* note 86, at 118-19 & n.141, 122-23 & nn.168-72. See Comment, 1965 U. ILL. L.F. 100, 109-10; Note, 51 VA. L. REV. 950, 952-53 (1965). Statements by the Supreme Court in *Strauder v. West Virginia*, 100 U.S. 303 (1880), offer a good illustration of apparent inconsistency. At one point in the opinion the Court stated that removal "is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sect. 641 is such a provision [which] . . . plainly has reference to sects. 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guaranteed by the Constitution" *Id.* at 311-12. Shortly after this apparent restriction of the removal procedure protection to the rights of two specific statutes, the Court seems to indicate that removal is appropriate for denial of rights provided "by the constitutional amendment [fourteenth] and sect. 1977 of the Revised Statutes" *Id.* at 312. Therefore, it is understandable that various courts have utilized the *Strauder* decision as authority for divergent determinations as to the scope of the generic phrase "any law." Compare *Baines v. City of Danville*, 357 F.2d 756, 764 & n.29 (4th Cir.), *aff'd mem.*, 382 U.S. 890 (1966), with *Peacock v. City of Greenwood*, 347 F.2d 679, 682 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966). See Johnson, *supra* note 86, at 118-19 & n.140-46.

⁹⁶ See *Baines v. City of Danville*, 357 F.2d 756 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966) (incorporating § 1 of the 1866 Act and § 16 of the 1870 Act and those post-1875 laws couched in egalitarian terms); *Peacock v. City of Greenwood*, 347 F.2d 679 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966) (incorporating the equal protection clause of the fourteenth amendment); *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966) (incorporating Civil Rights Act of 1964 and substantive civil rights statutes); *Cox v. Louisiana*, 348 F.2d 750 (5th Cir. 1965) (following the courts of appeals decisions of *Rachel* and *Peacock*, with general language possibly susceptible of a more expansive interpretation); *City of Chester v. Anderson*, 347 F.2d 823 (3d Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966) (per curiam decision following the courts of appeals decisions in *Rachel* and *Galamison*); *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965) (incorporating the equal protection clause of the fourteenth amendment and "laws that are couched in terms of equality, such as the historic and the recent equal rights statutes"). Of these cases, *Baines* presented the most comprehensive analysis of the scope of the generic phrase. See Note, 44 N.C.L. REV. 1152 (1966).

⁹⁷ See note 88 *supra*.

strength of its own conclusory observation that the language of the generic phrase "does not suggest that [Congress] . . . intended to *limit* the scope of removal to rights recognized in statutes existing in 1874."⁹⁸ Thus, the *Rachel* Court concluded that the open-ended character of the generic phrase "any law providing for . . . equal civil rights" made it amenable to incorporation of both existing and future statutes.⁹⁹

The decision to incorporate "laws" other than the 1866 and 1870 Acts was made notwithstanding the Court's acknowledgment of three facets of legislative history militating against assigning the generic phrase an open-ended character.¹⁰⁰ In the first instance, even though the fourteenth and fifteenth¹⁰¹ amendments and much of their implementing legislation¹⁰² had been enacted prior to the 1875 revision, "Congress had not significantly enlarged the opportunity for removal available to private persons beyond the relatively narrow category of rights specified in the 1866 Act."¹⁰³ Secondly, in the 1875

⁹⁸ 384 U.S. at 789. (Emphasis added.) It can, however, be just as logically deduced that the language of the generic phrase does not suggest that Congress intended to *expand* the scope of removal beyond the rights recognized in statutes existing in 1874. Indeed, the fact that the generic phrase contains only the broad, general language "equal civil rights" allows one to speculate upon what Congress "intended" without having to reconcile difficult and obscure textual passages. However, since neither Congress nor the 1875 revisers indicated an intent to make substantive changes in the removal provisions by the revision (see notes 14, 88 *supra*), any speculation, by definition, will embody a certain amount of arbitrariness.

⁹⁹ 384 U.S. at 789. *Rachel's* decision to assign the generic phrase an open-ended character was based on the following conclusion: "On the contrary, Congress' choice of the open-ended phrase 'any law providing for . . . equal civil rights' was clearly appropriate to permit removal in cases involving a 'right under' both existing and future statutes that provided for equal civil rights." *Ibid.* Part of the unexplained reasoning supporting *Rachel's* conclusory determination might be found in a statement by the Court of Appeals for the Fourth Circuit, to wit: "The most reasonable explanation of the choice of language would appear to be that the revisers understood that the laws were not static and that the Congress in the future might enact additional legislation similar to the Civil Rights Acts of 1866 and 1870, with an intention to expand the removal rights. Their use of generic language in Section 641 would take care of that situation." *Baines v. City of Danville*, 357 F.2d 756, 764 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). See 44 N.C.L. Rev. 1152, 1153-54 (1966).

¹⁰⁰ *Georgia v. Rachel*, 384 U.S. 780, 788-92 (1966).

¹⁰¹ U.S. CONST. amend. XV.

¹⁰² *E.g.*, Act of May 31, 1870, ch. 114, 16 Stat. 140, as amended by Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Act of April 20, 1871, ch. 22, 17 Stat. 13.

¹⁰³ *Georgia v. Rachel*, 384 U.S. 780, 790 (1966). While various other "laws" had come into being prior to the 1875 revision, none of these other "laws" was provided with the type of removal procedure protection embodied in subsection 1 of section 1443. The Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 (now REV. STAT. § 2004 (1875), 42 U.S.C. § 1971 (a) (1) (1964)), as amended by Act of Feb. 28, 1871, ch. 99, § 16, 16 Stat. 438, granted removal to "any officer . . . or other person" acting under color of authority, a

revision only the rights of the Civil Rights Act of 1866 and its re-enactment in the Civil Rights Act of 1870 were associated with the removal provisions by marginal notations and cross-references in brackets at the conclusion of the text of the procedure.¹⁰⁴ Finally, the 1875 revision was authorized solely for the narrowly defined purpose of codification and simplification of existing statutes.¹⁰⁵

Yet, it was these three restrictive guideposts of legislative history that *Rachel* utilized in its determination of which categories of "laws" were to be incorporated within the now open-ended generic phrase.¹⁰⁶ Placing major emphasis on the 1866 Act and its successors,¹⁰⁷ *Rachel* concluded that the "laws" encompassed within the generic phrase were those "comparable in nature to the Civil Rights Act of 1866."¹⁰⁸ To discern this "nature," attention was directed to the 1866 Act's legislative history and textual language.¹⁰⁹

procedure similar to that provided by the "authority clause" of subsection 2 of § 1443. See notes 50-69 *supra* and accompanying text. This amending act did not specify a removal procedure for voting rights similar to the procedure contained in subsection 1 of § 1443. In the 1875 revision, the guarantee of the amending Act of Feb. 28, 1871, was embodied within a different removal procedure, REV. STAT. § 643 (1875) (now 28 U.S.C. § 1442 (a) (1) (1964)), rather than REV. STAT. § 641 (1875), the predecessor of 28 U.S.C. § 1443 (1964). This distinctly separate removal provision for the protection of voting rights was repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36. See note 142 *infra* and accompanying text.

¹⁰⁴ Although the 1866 and 1870 Acts' more explicit method of designating which rights were to be protected by the removal remedy (see notes 82-86 *supra* and accompanying text) was abandoned in the 1875 revision in favor of the generic phrase "any law providing for . . . equal civil rights" (see note 88 *supra*), there was substantial association between the removal procedure and the rights granted in § 1 of the 1866 Act and § 16 of the 1870 Act to indicate that these rights still maintained their removal remedy protection. *Georgia v. Rachel*, 384 U.S. at 790-91. The principal rights of § 1 of the 1866 Act, except for ones dealing with real and personal property (see note 10 *supra*), and the rights of § 16 of the 1870 Act, except those dealing with aliens (see notes 85, 87 *supra*), were referred to in the marginal notations to the removal procedure and were cross referenced by the use of brackets at the conclusion of the text of the removal provisions. REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)). The rights dealing with aliens, see notes 85, 87 *supra*, were likewise associated with the removal procedure by marginal notations. REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)). Courts and commentators are in agreement that the rights provided with removal protection in their original enactments in the 1866 and 1870 Acts retained this procedural protection in the 1875 revision. See, e.g., *Baines v. City of Danville*, 357 F.2d 756, 762-63 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *Amsterdam*, *supra* note 59, at 868.

¹⁰⁵ See note 14 *supra* and accompanying text.

¹⁰⁶ 384 U.S. at 789-91.

¹⁰⁷ For discussion of the 1866 Act, its re-enactment in the 1870 Act, and the 1875 revision of the 1866 Act, see notes 103-05 *supra* and accompanying text.

¹⁰⁸ 384 U.S. at 790.

¹⁰⁹ *Id.* at 791-92. See generally FLACK 11-54; Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

The Court pointed out that in formulating the final version of the 1866 Act, the Thirty-ninth Congress not only had included a phrase expressly defining the rights in terms of racial equality¹¹⁰ but also had rejected, after rigorous debate, the broad proviso forbidding "discrimination in civil rights or immunities."¹¹¹ *Rachel* therefore determined that the 1866 Act was designed to guarantee a limited category of rights, narrowly defined in terms of racial equality.¹¹² Utilizing the Civil Rights Act of 1866 as the prototype of the "laws" protected by the removal procedure, the Court concluded that the generic phrase "must be construed to mean any law providing for specific civil rights stated in terms of racial equality."¹¹³

The most emphasized aspect of the Court's formula is the requisite that a successful removal petition must rely on a law whose guaranteed rights are "stated in terms of racial equality."¹¹⁴ The racial criterion, however, is particularly suspect in view of the legislative history of the Civil Rights Acts of 1866 and 1870. While the principal rights provided with removal protection by these statutes are

¹¹⁰ Section 1 of the 1866 Civil Rights Act, as finally enacted, contained the following phrase: "shall have the same [rights enumerated within this section] . . . as [are] . . . enjoyed by white citizens." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. §§ 1977-78 (1875), 42 U.S.C. §§ 1981-82 (1964)).

¹¹¹ CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866) [covering 1833-1873] (remarks by Representative Wilson in reporting back the amendment which struck the reference to civil rights and immunities). The deleted language read: "There . . . shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery." *Ibid.*

Although the reason given for the deletion was that "some gentlemen were apprehensive that the words . . . might give warrant for a latitudinarian construction not intended," *ibid.*, the concern was not whether this guarantee was bottomed on racial equality but rather whether the term "civil rights" encompassed voting rights. *E.g., id.* at 476-77 (remarks of Senator Saulsbury); *id.* at 505-06 (remarks of Senator Johnson); *id.* at 599 (remarks of Senator Trumbull); *id.* at 1117 (remarks of Representative Wilson); *id.* at 1121-22 (remarks of Representative Rogers); *id.* at 1290-93 (remarks of Representative Bingham). See notes 139-40 *infra* and accompanying text. For a recounting of this debate, see Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 11-29 (1955); Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 74-78.

¹¹² 384 U.S. at 791.

¹¹³ *Id.* at 792. The racial equality criterion was also imposed by various courts of appeals. *E.g., Baines v. City of Danville*, 357 F.2d 756, 781 n.31 (4th Cir.) (dissenting opinion), *aff'd mem.*, 384 U.S. 890 (1966); *Peacock v. City of Greenwood*, 347 F.2d 679, 682 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808, 835 (1966). *But see Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 866-74 (1965).

¹¹⁴ *Georgia v. Rachel*, 384 U.S. 780, 792 (1966).

admittedly expressed in terms of racial equality,¹¹⁵ it is also true that one specifically defined right in the 1870 Act relating to the protection of aliens was not couched in terms of racial equality nor was a determination of racial discrimination requisite to its invocation.¹¹⁶ Furthermore, this same guarantee, since repealed,¹¹⁷ was linked to the removal provision in the 1875 revision by the use of marginal notations.¹¹⁸ Nevertheless, in view of the Court's insistence upon racial equality, an ironic situation is produced: In developing its formula, which excludes rights not stated in terms of racial equality, the Court relied heavily on the legislative history of the 1866 and 1870 Acts.¹¹⁹ Yet the requisite of racial equality in *Rachel's* formula would apparently have exacted the repudiation of a right which had consistently been connected with the removal procedure.¹²⁰ Furthermore, the generic phrase mentions only "equal civil rights," phraseology which contains no explicit racial qualification. Nevertheless, the Court's demand for the racial equality element is clear.¹²¹

¹¹⁵ See text of § 1 of the Act of 1866 (note 10 *supra*) and text of § 16 of the Act of 1870 (note 85 *supra*).

¹¹⁶ The prohibition against any state imposing an unequal "tax or charge" on aliens immigrating into a state was phrased in terms of mere equality of treatment. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144; notes 85, 87 *supra*. Although this right was repealed by Act of June 27, 1952, ch. 477, § 403 (a) (1), 66 Stat. 279, it was in force as REV. STAT. § 2164 (1875) when the generic phrase was created in the 1875 revision and was connected to the removal provisions by marginal notations, REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)) (see note 104 *supra*).

¹¹⁷ See Act of June 27, 1952, ch. 477, § 403 (a) (1), 66 Stat. 279.

¹¹⁸ See note 104 *supra* and accompanying text. See *Baines v. City of Danville*, 357 F.2d 756, 760-63 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *Johnson*, *supra* note 86, at 107-10.

¹¹⁹ *Georgia v. Rachel*, 384 U.S. 780, 788-92 (1966). *Rachel* apparently recognized that the dealing with aliens provided in § 16 of the 1870 Act (note 85 *supra*) was given removal procedure protection in its original enactment and the 1875 revision. 384 U.S. at 790-91.

¹²⁰ See notes 118-19 *supra* and accompanying text. Consider the approach taken in *Baines v. City of Danville*, 357 F.2d 756, 762-63 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966).

¹²¹ Some uncertainty as to the validity of the racial criterion is created by the Supreme Court's disposition of the removal claims in *Kentucky v. Powers*, 201 U.S. 1 (1906), the last decision of the *Strauder-Powers* cases. Although the facts of the case involved a white defendant seeking removal on the basis of alleged denial by misapplication of the law due to political prejudice, the Court went to great lengths to deny removal on other grounds, conspicuously failing to note the lack of an alleged denial on the basis of race. See *Johnson*, *supra* note 86, at 133. The Supreme Court in *Rachel* acknowledged this reliance in *Powers* on an alleged denial motivated by political prejudice but apparently attributed no significance to it. 384 U.S. at 802.

One commentator, who had advocated extension of the removal remedy protection beyond the strict adherence to the requirement of racial equality has stated: "It is difficult to imagine that the revisers of 1875 did not take account of the ordinary and

In addition to the inclusion of the Acts of 1866 and 1870, the Court in *Rachel* and *Peacock* incorporated rights under laws which have never been directly connected with the removal procedure, but which are couched in terms of racial equality—namely, the Civil Rights Act of 1964,¹²² the voting rights sections of the Civil Rights Act of 1870¹²³ and the Civil Rights Act of 1957.¹²⁴ Furthermore, the guaran-

necessary flexibility of legislative means, and in their concern for statutes protecting 'equal civil rights,' did not understand that there had been and doubtless would continue to be statutes of egalitarian purpose which nevertheless did not proceed to their purposes simply by providing that A's treatment should be equal with B's." Amsterdam, *supra* note 113, at 872.

For various shades of positions by commentators who have advocated an extension of the removal remedy protection beyond the strict adherence to the requirement of racial equality of treatment, see *id.* at 866-74; Johnson, *supra* note 86, at 134-46.

¹²² Civil Rights Act of 1964, §§ 201-03, 78 Stat. 243, 42 U.S.C. §§ 2000a to a-2 (1964). See note 32 *supra*. *Rachel* explicitly stated that the rights provided by §§ 201-03 of the 1964 Act were within the scope of the generic phrase because they were framed in terms of racial equality. 384 U.S. at 792-93.

The rights contained in §§ 201-03 of the 1964 Act were not enacted with explicit removal procedure protection. Regardless, these rights, as originally enacted, were indirectly associated with the removal provisions, for the 1964 Act contained an amendment eliminating the appeal bar to orders of remand in removal cases under § 1443. See note 19 *supra*. This fact apparently persuaded one court to conclude that the rights of §§ 201-03 were to be protected by the removal remedy. *Rachel v. Georgia*, 342 F.2d 336, 342 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966). Also, the legislative history of the Civil Rights Act of 1964 lends supports to the conclusion that the enacting legislators envisioned that the rights defined by §§ 201-03 were to receive removal protection. See 110 CONG. REC. 6551 (1964) (remarks by Senator Humphrey); *id.* at 6955-56 (remarks by Senator Dodd); H.R. REP. NO. 914, 88th Cong., 1st Sess. pt. 1, at 32, 59, 88, 111 (1963); H.R. REP. NO. 914, 88th Cong., 1st Sess. pt. 2, at 31-32 (1963). See Johnson, *supra* note 86, at 127-28.

¹²³ Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 (now REV. STAT. § 2004 (1875), 42 U.S.C. § 1971 (a) (1) (1964)); see note 38 *supra*. *Peacock* stated that it was proceeding on the premise that these rights were incorporated by the generic phrase (see note 124 *infra*). 384 U.S. at 825. The rights provided by § 1 of the 1870 Act have never been related to the type of removal procedure embodied in subsection 1 of § 1443. See notes 103 *supra* and 142 *infra* and accompanying text.

¹²⁴ Civil Rights Act of 1957, § 131, 71 Stat. 637, 42 U.S.C. § 1971 (b) (1964); see note 39 *supra*. The voting rights expressed in § 131 of the 1957 Act were not provided with removal procedure protection in their enactment.

Although *Peacock* did not explicitly refer to the Civil Rights Act of 1957, the Court stated that "we may proceed here on the premise that at least the two federal statutes specifically referred to in the removal petitions, 42 U.S.C. § 1971 and 42 U.S.C. § 1981, do qualify under the statutory definition [of the generic phrase]." 384 U.S. at 825. The defendants in *Peacock*, in seeking removal under subsection 2 of § 1443 did rely on "42 U.S.C. § 1971 *et seq.*," apparently seeking the assistance of the entire range of rights provided by various subsections of § 1971. See 384 U.S. at 811; notes 38-40 *supra* and accompanying text. Presumably *Peacock's* reference to 42 U.S.C. § 1971 (1964) was intended to encompass § 1971 (b), the Court finding it appropriate to quote the statute's text in a footnote. 384 U.S. at 811 n.3. The difficulty with the incorporation of § 1971 (b), if such was intended, is that these rights are not only phrased without language denoting any form of equality but also can be invoked without any reference to any form of inequality. See Note, *Federal Protection of Negro Voting*

tees provided by the first amendment and the due process clause of the fourteenth amendment were expressly excluded because these rights "are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands."¹²⁵

Even though the Court was ostensibly firm in its mandate that rights be "stated in terms of racial equality," it did not appear to demand any particular mode of expression of the racial element. The principal rights provided with removal protection by the Acts of 1866 and 1870 denoted the requirement of racial equality by the phrase "as is enjoyed by white citizens."¹²⁶ Therefore, it appears that to qualify under the Court's formula the "law" does not have to employ the word "race" such as was done in the Civil Rights Act of 1964¹²⁷ but merely may utilize words importing that the rights are founded on racial equality.¹²⁸ Furthermore, because the Court was

Rights, 51 VA. L. REV. 1051, 1055 & n.10 (1965). For the statutory text, see note 39 *supra*. Arguably, if presented with the question, the Supreme Court might attempt consistency in its demand for rights stated in terms of racial equality by relying on the fact that § 1971 (b) was an amendment to 42 U.S.C. § 1971 (a) (1) (1964), which grants protection for voting rights and is explicitly stated in terms of racial equality. On this basis, the Court might reason that the right to be free from intimidation, coercion, and threats with racial overtones is one of the implied rights of § 1971 (b) and can be isolated for removal purposes. If this is accomplished, then the formula's limitation regarding expression of rights in terms of racial equality has been greatly narrowed.

A similar problem is raised by § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 445, 42 U.S.C. § 1973i (b) (Supp. I, 1965), which provides:

"No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, or threaten, or coerce any person for exercising any powers or duties under sections 1973a (a), 1973d, 1973f, 1973g, 1973k or 1973j (e) of this title." *Peacock* gave no clear indication of whether it did or would include the rights contained in § 1973i (b). 384 U.S. at 811 n.3; see note 240 *infra*. Regardless, since § 1973i (b) was enacted as part of a statute designed to enforce the fifteenth amendment and is connected with provisions guaranteeing the right to vote on the basis of racial equality (see Voting Rights Act of 1965, §§ 2, 11a, 79 Stat. 437, 42 U.S.C. §§ 1973, 1973i (a) (Supp. I, 1965), an approach similar to the proposed argument regarding § 1971 (b) might be used by a future court to incorporate these voting rights within the scope of the generic phrase.

¹²⁵ *Georgia v. Rachel*, 384 U.S. 780, 792 (1966).

¹²⁶ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27; Act of May 11, 1870, ch. 114, § 16, 16 Stat. 144. See notes 10, 85, 87 *supra*.

¹²⁷ Civil Rights Act of 1964, §§ 201-03, 78 Stat. 243, 42 U.S.C. § 2000a to a-2 (1964). To denote the prohibitions against inequality of treatment, the statute proscribed "discrimination or segregation on the ground of race, color, religion, or national origin." *Ibid.* See note 32 *supra* for the statutory text.

¹²⁸ See note 124 *supra* for a discussion of rights which, although not even couched in terms of equality, have been so interrelated with other rights stated in terms of

amenable to inclusion of the Civil Rights Act of 1964, it appears that if one relies on a right which is founded on racial equality, it is of no moment that the particular law involved requires equality on such additional grounds as sex, national origin, religion, and age.¹²⁹

Furthermore, an issue of specificity arose in the formula's use of the words "*specific* civil rights."¹³⁰ The narrowing effect of requiring that the rights be "specific" ones is considerably diminished by the fact that only a limited number of "laws," such as the first and fourteenth amendments, might be vulnerable to exclusion under this mandate. The Court, however, did not intimate that the mere lack of specificity would be fatal regarding inclusion within the generic phrase. The rights under the first amendment and the due process clause of the fourteenth amendment were rejected because they lacked the element of racial equality rather than sufficient specificity.¹³¹ Also, the Court incorporated within the generic phrase the rights which were to be protected by the original grant of the removal remedy in the 1866 Act,¹³² although portions of that Act were not phrased with substantial specificity beyond the denotation of racial equality.¹³³ Indeed, in the particular exclusions and inclusions in *Rachel* and *Peacock* the Court assigned the word "specific" no functional value, apparently treating it as redundant in

racial equality that a future court might grant them removal procedure protection.

¹²⁹ See note 127 *supra*.

¹³⁰ *Georgia v. Rachel*, 384 U.S. 780, 792 (1966). (Emphasis added.) See note 113 *supra* and accompanying text.

¹³¹ In *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965), the Court of Appeals for the Second Circuit, after it had equated the coverage of the generic phrases of subsections 1 and 2, 342 F.2d at 264, concluded: "[Section] . . . 1443 (2) applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . ." *Id.* at 269. "When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *Id.* at 271. In rejecting the first amendment and the due process clause of the fourteenth amendment, *Rachel* quoted the above statements of *Galamison*. 384 U.S. at 792. See *City of Greenwood v. Peacock*, 384 U.S. 808, 825 (1966).

¹³² *Georgia v. Rachel*, 384 U.S. 780, 788-92 (1966); *City of Greenwood v. Peacock*, *supra* note 131, at 825. See note 10 *supra* for an enumeration of these rights.

¹³³ For example, "citizens . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . ." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1964)).

reemphasizing the Court's insistence that the "civil rights" be ones stated in terms of racial equality.

On the other hand, both *Rachel* and *Peacock* do shed some light on the meaning of the phrase "civil rights." Although the Court did not expressly define its scope, except for the explicit demand that the rights involve racial equality,¹³⁴ nevertheless some indication was given as to the possible breadth of the term by the statutes specifically incorporated within the ambit of the Court's formula. For example, since *Peacock*¹³⁵ included the voting guarantees of the Civil Rights Act of 1870,¹³⁶ it would appear that the Court viewed voting rights as subsumed in the category "civil rights" as opposed to treating them as narrowly classified, mutually exclusive political rights.¹³⁷ Indeed, this predilection was envisioned by some congressmen during the debates over the 1866 Act.¹³⁸ After the expression of fear concerning the probable quest to bring voting rights within the framework of the 1866 Act by the conduit of the term "civil rights,"¹³⁹

¹³⁴ *City of Greenwood v. Peacock*, 384 U.S. 808, 825 (1966); *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966).

¹³⁵ 384 U.S. at 825; see notes 122-25 *supra* and accompanying text.

¹³⁶ Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 (now REV. STAT. § 2004 (1875), 42 U.S.C. § 1971 (a) (1) (1964)). See the full text of the relevant statutory rights, note 38 *supra*.

¹³⁷ See notes 111 *supra* and accompanying text and 138-42 *infra* and accompanying text.

¹³⁸ See notes 111 *supra* and 139-40 *infra* and accompanying text.

¹³⁹ Before the phrase "discrimination in civil rights or immunities" was struck from the 1866 Act, see note 111 *supra*, Senator Saulsbury offered an amendment to the act to add after the words "civil rights" the phrase "except the right to vote in the States." CONG. GLOBE, 39th Cong., 1st Sess. 606 (1866) [covering 1833-1873]. Immediately before this amendment was defeated, Senator Trumbull, the architect of the 1866 Act, stated in opposition to Saulsbury's amendment: "[T]hat is a political privilege, not a civil right. This bill relates to civil rights only, and I do not want to bring up the question of negro suffrage in the bill. I hope the Senator will not persist in any such amendment." *Ibid.* Although the amendment was defeated, and not withstanding Senator Trumbull's declarations, some legislators still feared the broad interpretation which the words "civil rights" might receive. Representative Bingham, one of the arch opponents of including the phrase "discrimination in civil rights or immunities" in the 1866 Act, stated: "I submit with all respect that the term 'political rights' is only a limitation of the term 'civil rights,' and by general acceptance signifies that class of civil rights which are more directly exercised by the citizen in connection with the government of his country. If this be so, are not political rights all embraced in the term 'civil rights,' and must it not of necessity be so interpreted?" *Id.* at 1291. The Supreme Court in *Rachel* seemed to acknowledge the fact that some legislators feared that a broad interpretation of "civil rights" might encompass voting rights when the Court stated: "Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general as one against 'discrimination in civil rights or immunities.'" 384 U.S. at 791. See generally FLACK 11-29; Bickel, *supra* note 111, at 11-29; Frank & Munro, *supra* note 109, at 139-41; Van Alstyne, *supra* note 111, at 74-78.

the Thirty-ninth Congress purposely deleted from the 1866 Act the prohibition against "discrimination in civil rights or immunities."¹⁴⁰ Since the 1866 Act was used by *Rachel* as the model for the generic phrase,¹⁴¹ it is arguable that voting rights should not qualify for removal protection since Congress specifically intended that they not be covered by the 1866 Act.¹⁴² In further demonstration of the broad scope which the Court assigned to the term "civil rights," *Peacock* stated that first amendment rights, notwithstanding their exclusion from the generic phrase for failure to meet the racial equality requisite,¹⁴³ are "undoubtedly comprehended in the concept

¹⁴⁰ See note 111 *supra*.

¹⁴¹ 384 U.S. at 791-92. Because *Rachel* concluded that the 1866 Act should serve as the prototype for determining which rights were to be incorporated within the ambit of the generic phrase, it is interesting to note the apparent limitation assigned the term "civil rights" in relation to voting rights by Senator Trumbull, who declared: "The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right . . ." CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) [covering 1833-1873]. See note 139 *supra*.

¹⁴² In *Peacock* the voting rights contained in § 1 of the 1870 Act apparently are incorporated for the first time by the Supreme Court within the scope of the denial clause. For a short period of time the rights originally granted in § 1 of the 1870 Act (now REV. STAT. § 2004 (1875), 42 U.S.C. § 1971 (a) (1) (1964); see note 38 *supra*) were provided with the type of removal procedure protection embodied in subsection 2 of § 1443, but these rights have never been associated with a legislative grant of removal protection such as that detailed by subsection 1 of § 1443. See note 103 *supra* and accompanying text. They are now provided with removal protection by another removal statute similar to subsection 2. 28 U.S.C. § 1442 (a) (1) (1964). Although the Supreme Court in *Neal v. Delaware*, 103 U.S. 370 (1881), the third case in the *Strauder-Powers* line of decisions, was presented with the opportunity to incorporate voting rights within the scope of the generic phrase, the Court neither explicitly included nor excluded them from the scope of the generic phrase. *Id.* at 386-93. See Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443*, 26 FED. B.J. 99, 110-11 (1966).

There is a further basis upon which *Peacock's* inclusion of the voting rights guaranteed in § 1 of the 1870 Act might be challenged. The procedural and jurisdictional sections of the 1870 Act for the deprivation of the voting rights granted by that act appear to contemplate only original actions. See Act of May 31, 1870, ch. 114, 16 Stat. 140; Johnson, *supra*, at 110 & nn.82-83. In contrast, the rights guaranteed by § 16 of the same act were to be enforced by *both* original actions *and* the removal remedy. See note 86 *supra* and accompanying text. Thus, despite the fact that the voting rights of § 1 have never been associated with the removal procedure of 28 U.S.C. § 1443 (1) (1964) and its predecessors (see notes 103, 139-41 *supra* and accompanying text), *Peacock* seemingly incorporated these rights within the scope of the generic phrase, apparently on the strength of *Rachel's* reasoning that a law providing for civil rights stated in terms of racial equality qualified, without more, for inclusion within the generic phrase. *City of Greenwood v. Peacock*, 384 U.S. 808, 825 (1966); see *Georgia v. Rachel*, 384 U.S. 780, 790-92 (1966).

¹⁴³ See 384 U.S. at 825; *Georgia v. Rachel*, 384 U.S. 780, 792 (1966).

of 'civil rights.'"¹⁴⁴ Thus, while the Court quite obviously took a latitudinarian approach to the term "civil rights," it failed to elucidate the full scope of the term beyond the demand for "civil rights . . . of racial equality."¹⁴⁵

The remaining interpretive problem inherent in the Court's formula is posed by the words "any law," the identical terminology employed by the generic phrase. Specifically, it is unclear whether the formula comprehends both constitutional provisions and federal statutes or only the latter.¹⁴⁶ Although *Rachel* explicitly declared that the generic phrase encompassed both existing and future statutes,¹⁴⁷ the Court left unanswered the question whether or not "any law" contemplated *only* statutes to the exclusion of constitutional provisions.¹⁴⁸ The first amendment and the due process clause of the fourteenth amendment were rejected because these rights lacked the requisite element of racial equality,¹⁴⁹ the Court remain-

¹⁴⁴ 384 U.S. at 825.

¹⁴⁵ *Georgia v. Rachel*, 384 U.S. 780, 792 (1966); see note 113 *supra*.

¹⁴⁶ The number of possible constructions a court might assign the words "any law" in the generic phrase is a contributing factor to the divergent positions taken by various courts of appeals. Compare *Baines v. City of Danville*, 357 F.2d 756, 762-64 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966), with *New York v. Galamison*, 342 F.2d 255, 264-71 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965) and *Peacock v. City of Greenwood*, 347 F.2d 679, 682 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966). Commentators have addressed themselves to various issues posed by the generic phrase, including the question of whether the term "any law" encompasses constitutional provisions in addition to statutes. See, e.g., *Amsterdam*, *supra* note 113, at 863-74; *Johnson*, *supra* note 142, at 112-28; Comment, 1965 U. ILL. L.F. 100 (1965); Note, 51 VA. L. REV. 950 (1965). See note 159 *infra* and accompanying text.

¹⁴⁷ 384 U.S. at 789; see notes 98-99 *supra* and accompanying text.

¹⁴⁸ Although the Court in *Rachel* and *Peacock* had ample opportunity to use words to distinguish among statutes, the Constitution, and its amendments, it declined to do so, referring to specific enactment(s) by such words and phrases as "law," "laws," "'law,'" and "any law providing for . . . equal civil rights." *City of Greenwood v. Peacock*, 384 U.S. 808, 825 (1966); *Georgia v. Rachel*, 384 U.S. 780, 789-93 (1966). *Rachel* quoted with approval a segment of the opinion in *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965), where the Court of Appeals for the Second Circuit had excluded the due process clause of the fourteenth amendment from the ambit of the generic phrase of subsection 2 of § 1443. *Georgia v. Rachel*, *supra* at 792. Yet *Galamison* affirmatively incorporated the equal protection clause of the fourteenth amendment within the bounds of the generic phrase. 342 F.2d at 265, 271. The lack of clear decision on the issue of constitutional provisions can be seen in a footnote to the *Rachel* opinion where the Court noted that in the 1875 revision the word "law" was assigned various divergent meanings in different sections of the *Revised Statutes* (1875). 384 U.S. at 790 n.13. See note 159 *infra*. When the Court in *Peacock* stated that it was not pursuing to conclusion the limitations of the generic phrase, it might have been referring in part to the interpretive problems posed by the words "any law." 384 U.S. at 825.

¹⁴⁹ *City of Greenwood v. Peacock*, *supra* note 148, at 825; *Georgia v. Rachel*, *supra* note 148, at 792. Although the Supreme Court has now conclusively excluded the first

ing conspicuously silent regarding the fact that these rights were not embodied within statutes. *Peacock* offered no additional insight, specifically stating that the Court was not resolving the limits of the generic phrase.¹⁵⁰

One of the major issues left unresolved by the Court is the possible incorporation of the fourteenth amendment's equal protection clause into the removal remedy. Although the fourteenth amendment has never been statutorily linked with the removal provision,¹⁵¹

amendment and the due process clause of the fourteenth amendment from the ambit of the generic phrase, it is interesting to note the history of debate surrounding this issue. Courts of appeals have generally excluded these rights. See, e.g., *Baines v. City of Danville*, 357 F.2d 756, 762-64 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *Peacock v. City of Greenwood*, 347 F.2d 679, 682 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966); *New York v. Galamison*, 342 F.2d 255, 266-71 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965). Various commentators, on the other hand, have argued that the removal provisions' greatest utility is derived from the protection of the first amendment and the due process clause of the fourteenth amendment. See, e.g., *Amsterdam*, *supra* note 113, at 863-74; *Comment*, 1965 U. ILL. L.F. 100, 109-10 (1965). See also *Johnson*, *supra* note 142, at 117-24; *Note*, 51 VA. L. REV. 950, 952-53 (1965).

If the decision is made to restrict the words "any law" to statutes, then removal for alleged denials under the first amendment and the due process clause of the fourteenth amendment might arguably be achieved in an indirect manner by the employment of Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (now REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964)). This statute presently provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

If this section were included within the scope of the removal statute, then the issue concerning the scope of the words "any law" would be moot. There are forceful arguments favoring its inclusion. See *New York v. Galamison*, 342 F.2d 255, 281-82 & n.8 (2d Cir.) (dissenting opinion), *cert. denied*, 380 U.S. 977 (1965); *Amsterdam*, *supra* note 113, at 866-74. There are, however, various factors militating against such a result. Although, as originally enacted, the 1871 Act's procedural devices for redressing the abridgment of the "rights, privileges, or immunities" were denoted by reference to the remedial procedures of the Civil Rights Act of 1866, a textual comparison of the procedural and jurisdiction sections of the Acts of 1866, 1870, and 1871 is persuasive evidence that the procedure contemplated in the 1871 Act's reference was the original action provision of the 1866 Act. See *Johnson*, *supra* note 142, at 116-17. In the 1875 revision not one method of cross reference is employed to connect the removal provision and the 1871 Act. See *Baines v. City of Danville*, 357 F.2d 756, 762-64 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *Johnson*, *supra* note 142, at 115. Furthermore, from a practical standpoint, the rights embodied in § 1983 will probably not receive removal protection as they are not phrased in terms of racial equality demanded by the *Rachel* formula.

¹⁵⁰ 384 U.S. at 825.

¹⁵¹ See *Baines v. City of Danville*, 357 F.2d 756, 760-63 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). The *Rachel* Court affirmatively noted that the fourteenth amendment had not been provided with removal procedure protection in its passage nor in the

it is arguable that the equal protection clause meets the Court's criteria for inclusion within the now open-ended generic phrase.¹⁵² Rights under the equal protection clause clearly would meet the Court's demand for a guarantee providing "civil rights" phrased with the requisite specificity.¹⁵³ Although the equal protection clause is not stated in terms of racial equality, one of the major reasons for its passage was to enshrine in amendment form the right of racial equality in legal treatment.¹⁵⁴ Even though the evolution of the equal protection clause has brought its guarantee ever closer to equality of legal protection for all classes,¹⁵⁵ its mandate for racial equality is clear. Therefore, it is arguable that while not stated in

1875 revision, 384 U.S. at 790, but the Court, while explicitly excluding the due process clause, specifically refrained or neglected to make a determination as to the equal protection clause. *Id.* at 792. Furthermore, in excluding the first amendment and the due process clause of the fourteenth amendment, *Rachel* quoted the definition of the rights encompassed by the markedly similar generic phrase of subsection 2 of § 1443 advanced in *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 380 U.S. 977 (1965). See note 131 *supra*. After equating the scope of the generic phrases of both subsections 1 and 2, 342 F.2d at 264, the *Galamison* court incorporated the equal protection clause within the generic phrase. *Id.* at 265, 271.

¹⁵² See notes 98-99 *supra* and accompanying text. Various courts have concluded that the equal protection clause is within the ambit of the generic phrase. See, e.g., *Peacock v. City of Greenwood*, 347 F.2d 679, 682 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966); *New York v. Galamison*, 342 F.2d at 271; *Steel v. Superior Court*, 164 F.2d 781, 782 (9th Cir. 1947). Commentators have urged the same conclusion. See, e.g., Comment, 1965 U. ILL. L.F. 100, 109 (1965); Note, 51 VA. L. REV. 950, 952-53 (1965); 12 How. L.J. 158 (1966). During the debates over the proposed lifting of the appeal bar to remand orders by the Civil Rights Act of 1964, Representatives Poff and Cramer, two opponents of the measure, stated: "The catalog of lawsuits which title IX would affect incorporates, among others, all suits in which the defendant might invoke the equal protection clause of the 14th amendment. This is too long to itemize." H.R. REP. NO. 914, 88th Cong., 1st Sess. pt. 1, at 111 (1963).

¹⁵³ See notes 126-33 *supra* and accompanying text.

¹⁵⁴ "Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948). See CONG. GLOBE, 39th Cong., 1st Sess. 2459, 2461-62, 2465-67, 2498, 2506, 2511, 2538, 2896, 2961, 3035 (1866) [covering 1833-1873]; *Baines v. City of Danville*, 357 F.2d 756, 775 (4th Cir.) (dissenting opinion), *aff'd mem.*, 384 U.S. 890 (1966); FLACK 20, 54, 94-96; Bickel, *supra* note 111, at 24, 47; Frank & Munro, *supra* note 109, at 139-40; Maslow & Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 367-69 (1953).

¹⁵⁵ See generally HARRIS, *THE QUEST FOR EQUALITY* 57-158 (1960); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963); Kellett, *The Expansion of Equality*, 37 SO. CAL. L. REV. 400 (1964); Kurland, "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 HARV. L. REV. 143-49 (1964); Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

terms of racial equality, the judicially recognized right of racial equality in the equal protection clause¹⁵⁶ should be capable of isolation for removal purposes.¹⁵⁷

Notwithstanding the aforementioned arguments favoring inclusion, the "any law" requirement of both the generic phrase and the Court's formula poses the most formidable obstacle to incorporation of the equal protection clause.¹⁵⁸ Legislative and judicial history offer little assistance in resolving the "any law" issue.¹⁵⁹ Nevertheless, *Rachel* determined that the generic phrase was open-ended in character as to statutes, its language being amenable to such a construction.¹⁶⁰ This conclusion was reached in spite of the Court's own observation that before the 1875 revision only the 1866 and 1870 Acts provided removal procedure protection for specifically enumerated rights.¹⁶¹ Therefore, any future exclusion of constitutional provisions from the ambit of the generic phrase would appear

¹⁵⁶ E.g., *United States v. Guest*, 383 U.S. 745, 753-54 (1966); *Wright v. Rockefeller*, 376 U.S. 52, 56-58 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kramer*, 334 U.S. 1, 20-23 (1948); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927); *Buchanan v. Warley*, 245 U.S. 60, 76-77 (1917); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873). For additional cases, see *United States v. Guest*, *supra* at 754 n.6.

¹⁵⁷ A related problem arises in connection with the identification of the racial equality element in certain voting rights statutes. See note 124 *supra*.

¹⁵⁸ See notes 146-50 *supra* and accompanying text.

¹⁵⁹ A firm basis to resolve whether the words "any law" of the generic phrase comprehend statutes, the Constitution, and its amendments cannot be found in the *Strauder-Powers* decisions. See notes 90-95, 142 *supra* and accompanying text; *Amsterdam*, *supra* note 113, at 873; *Johnson*, *supra* note 142, at 117-24.

A comparative analysis of the 1875 revisers' use of various relevant words and phrases—"statute," "Constitution," "law," and "any law providing for . . . equal civil rights"—produces only inconsistencies. Demonstration that the 1875 revisers did not assign the word "law(s)" any discernably consistent meaning in the revision is provided by the *Rachel* Court in a footnote where reference is made to two different uses of the word "law(s)." 384 U.S. at 790 n.13. Compare *Baines v. City of Danville*, 357 F.2d 756, 762-64 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966), with *Baines v. City of Danville*, 357 F.2d 756, 777 & n.18 (4th Cir.) (dissenting opinion), *aff'd mem.*, 384 U.S. 890 (1966). In response to the attempt in *New York v. Galamison*, 342 F.2d 255, 268 (2d Cir.), *cert. denied*, 380 U.S. 970 (1965), to find some consistency in the revisers' choice of language, one commentator has stated: "Applying the same logic to this section [REV. STAT. § 563, twelfth (1875)] that *Galamison* applies to § 629, sixteenth, one concludes that Congress must have distinguished rights secured by the Constitution for whose redress suits were authorized by law, and rights secured by law. This seems to me improbable; I prefer to recognize what is obvious to any reader of the post-War Civil Rights Acts: that they were obscurely and sloppily drafted, and obscurely and sloppily codified, and that close intersection comparison provides at best slight illumination." *Amsterdam*, *supra* note 113, at 871 n.311. See also *Johnson*, *supra* note 142, at 119-24.

¹⁶⁰ See notes 98-99 *supra* and accompanying text.

¹⁶¹ *Georgia v. Rachel*, 384 U.S. 780, 790-91 (1966); see notes 101-04 *supra* and accompanying text.

to be arbitrary if based on the theory that prior to the 1875 revision only certain statutory rights were protected by the removal remedy.¹⁶²

Initially, refusal to include the equal protection clause would seem to be totally justified on the theory that its guaranteed rights had never been associated with the removal remedy in its passage and the 1875 revision.¹⁶³ The strength of this justification, however, would appear to be somewhat diluted by the Court's incorporation of other laws, enacted both before¹⁶⁴ and after the 1875 revision,¹⁶⁵ which have never been directly linked with the removal procedure protection. Furthermore, it is arguable that a future court would have to allow inclusion of the equal protection clause if it is to remain consistent with the Court's purpose to allow inclusion of "laws comparable in nature to the Civil Rights Act of 1866."¹⁶⁶ No law is more "comparable in nature" to the 1866 Act than the equal protection clause of the fourteenth amendment.¹⁶⁷

¹⁶² If the equal protection clause were rejected because its rights are provided in amendment form rather than in a statute, an attempt might be made to give equal protection clause rights removal procedure protection by the conduit of REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964), which attempts to guarantee the security of "rights, privileges, or immunities secured by the Constitution and laws." See note 149 *supra*.

¹⁶³ See note 151 *supra* and accompanying text.

¹⁶⁴ Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 (now REV. STAT. § 2004 (1875), 42 U.S.C. § 1971 (a) (1) (1964)). See notes 123-24 *supra* and accompanying text.

¹⁶⁵ Civil Rights Act of 1964, §§ 201-03, 78 Stat. 243, 42 U.S.C. §§ 2000a to a-2 (1964) (see note 122 *supra*); Civil Rights Act of 1957, § 131, 71 Stat. 637, 42 U.S.C. § 1971 (b) (1964) (see note 124 *supra*).

Neither *Rachel* nor *Peacock* mentioned the Civil Rights Act of 1875, which was enacted after the 1875 revision. Act of March 1, 1875, ch. 114, 18 Stat. (Pt. 3) 335. Nevertheless, one might successfully invoke those rights of the 1875 Act which satisfy the Court's demand for rights stated in terms of racial equality. See Amsterdam, *supra* note 113, at 870. Section 1 of the 1875 Act, which provided for racial equality in the enjoyment of certain public accommodations, was declared unconstitutional in *Civil Rights Cases*, 109 U.S. 3, 25 (1883). For an argument favoring judicial resuscitation of § 1, see Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394 (1965). Regardless, § 4, whose guarantee is still viable today, provided in part: "[N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude" Act of March 1, 1875, ch. 114, § 4, 18 Stat. (Pt. 3) 336 (now 18 U.S.C. § 243 (1964)). Notwithstanding the fact that the 1875 Act as originally enacted appeared to contemplate original actions for the redress of denials and has never been provided with removal procedure protection by a legislative grant, see Johnson, *supra* note 142, at 124-27, the phrasing of the civil rights of § 4 in terms of racial equality would probably be sufficient for inclusion with the Court's formula. See generally Amsterdam, *supra* note 113, at 870.

¹⁶⁶ *Georgia v. Rachel*, 384 U.S. 780, 790 (1966); see notes 106-13 *supra* and accompanying text.

¹⁶⁷ See notes 154 *supra* and 168-71 *infra* and accompanying text.

There is, for example, a marked similarity in the phraseology of the 1866 Act and the equal protection clause.¹⁶⁸ The congressional policies providing the impetus for the passage of each were akin in nature.¹⁶⁹ Moreover, a major stimulus for the passage of the fourteenth amendment was the desire to enshrine the rights of the 1866 Act in amendment form, some legislators apparently voting for the amendment because of doubt as to the constitutionality of the act as applied to the states.¹⁷⁰ Indeed, it is said that "there is no reason to think that the rights contemplated by section 1 [of the Act of 1866] are of less breadth than those contemplated by the Equal Protection Clause."¹⁷¹

Therefore, even if a future court should deny inclusion to the equal protection clause by a restrictive interpretation of the words "any law," the Civil Rights Act of 1866 might provide an adequate recourse.¹⁷² Although not having been provided with the expansive interpretation sometimes accorded to constitutional provisions, one guarantee of the 1866 Act—namely, "all persons . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white per-

¹⁶⁸ The equal protection clause states "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The 1866 Civil Rights Act provided that all persons "shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens . . ." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1964)).

See *Baines v. City of Danville*, 357 F.2d 756, 775-76 (4th Cir.) (dissenting opinion), *aff'd mem.*, 384 U.S. 890 (1966); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 140 (1950).

¹⁶⁹ "Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the [fourteenth] Amendment. It is clear that in many significant respects the statute and the Amendment were the expressions of the same general congressional policy." *Hurd v. Hodge*, 334 U.S. 24, 32 (1948). See also *Buchanan v. Warley*, 245 U.S. 60, 79 (1917); FLACK 11-54; notes 6, 154 *supra*.

¹⁷⁰ See TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 183-85 (1951); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 43-54 (1949); note 154 *supra* and accompanying text.

¹⁷¹ *Baines v. City of Danville*, 357 F.2d 756, 775 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). "[I]t was acknowledged that the first section of the [fourteenth] Amendment was the Civil Rights Bill incorporated into the Constitution." FLACK 54. "[The Act of 1871] . . . is merely carrying out the principles of the civil rights bill [Act of 1866], which has since become a part of the Constitution." CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) [covering 1833-1873] (remarks of Senator Edmunds). See Frank & Munro, *supra* note 168, at 139-40; 44 N.C.L. REV. 1152, 1153-54 (1966); note 154 *supra* and accompanying text.

¹⁷² See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 21-22 (1955); 44 N.C.L. REV. 1152, 1153-54 (1966).

sons . . ."¹⁷³—might be construed to furnish rights of racial equality as extensive as those supplied by the equal protection clause.¹⁷⁴

SUBSECTION 1: THE DENIAL CLAUSE

A petitioner who initially relies upon a right encompassed within the scope of the generic phrase is still confronted by the formidable obstacle presented by the further requirement of section 1443 (1) that the right be one which the petitioner "is denied or cannot enforce in the courts of such State."¹⁷⁵ As originally enacted, the Civil Rights Act of 1866¹⁷⁶ allowed removal either before trial or after judgment.¹⁷⁷ Unfortunately, however, the legislative history is sparse and ambiguous as to the intended scope of this removal remedy.¹⁷⁸ Furthermore, in the *Revised Statutes* (1875) a severe

¹⁷³ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1964)).

¹⁷⁴ "I doubt that any meaningful distinction could be drawn for removal purposes between, for example, rights secured by 42 U.S.C. § 1981 ["full and equal benefit" guarantee] and those guaranteed by the Equal Protection Clause, which largely reiterated § 1981 in constitutional terms." *City of Greenwood v. Peacock*, 384 U.S. 808, 841 n.4 (1966) (Douglas, J., dissenting). One commentator has urged the circumvention of many potential restrictions contained in the generic phrase by a greater and broader reliance on the rights guaranteed by § 1981, particularly the phrase "full and equal benefit of all laws and proceedings." Johnson, *supra* note 142, at 128-31.

¹⁷⁵ 28 U.S.C. § 1443 (1) (1964). See complete language of § 1443 (1) contained in text accompanying note 23 *supra*.

¹⁷⁶ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (1964)). The origin of the "denial clause" is § 3 of the 1866 Act wherein removal was available to defendants "who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act . . ." Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (1964)); see note 53 *supra*. The 1875 revisers altered the phraseology of the removal provisions to read "is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending . . ." REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)). The Judicial Code of 1911 made only minor changes in punctuation and substituted the words "district court" for "circuit court" in another part of the removal provisions. Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096. In the revision of 1948, the phrase "or in the part of the State where such suit or prosecution is pending" was deleted as surplusage. The Reviser's Note stated the intention of making only changes in phraseology. H.R. REP. NO. 308, 80th Cong., 1st Sess. A134 (1947).

¹⁷⁷ The 1866 Act adopted by reference the procedural devices of the Habeas Corpus Suspension Act of 1863, ch. 81, § 5, 12 Stat. 756, as amended by Act of May 11, 1866, ch. 80, § 3, 14 Stat. 46 (see note 8 *supra*). Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 28 U.S.C. § 1443 (1964)). See note 11 *supra* and accompanying text for a discussion of these procedural devices.

¹⁷⁸ At one point in the debates surrounding the Civil Rights Act of 1866, Senator Trumbull, then Chairman of the Judiciary Committee and chief architect of the Act of 1866, stated: "It [the Act of 1866] will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and

complication was introduced when the revisers without explanation¹⁷⁹ deleted the *after-judgment* removal provision.¹⁸⁰ By retention of the *before-trial* procedure, the 1875 revision produced a textual paradox which apparently prescribed that removal could only be accomplished *before trial*¹⁸¹ on the basis of denials which occurred *in the courts* of the state.

all her laws discriminating between persons on account of race or color shall be abolished." CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) [covering 1833-1873].

This uncomplicated declaration of the operation of the 1866 Act is countered by other inconsistent and obscure statements of Trumbull. In his lengthy retort to the far-reaching effects envisioned by President Andrew Johnson in his veto message, Senator Trumbull presented an ambiguous definition of the functional range of the removal procedure, as follows:

"So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, the presumption being that the judge of the court, when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid.

"If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the constitutional amendment, which authorizes Congress to enforce by appropriate legislation the article declaring that 'neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or in any place subject to their jurisdiction.' That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, would have authority to allow him to come to the Federal courts in all cases." *Id.* at 1759.

Various and sometimes conflicting interpretations of this and other statements by Senator Trumbull have been presented. See *Georgia v. Rachel*, 384 U.S. 780, 794-96 & n.24 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808, 850 (1966) (Douglas, J., dissenting); *Baines v. City of Danville*, 357 F.2d 756, 766-67 & nn.37-40 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966); *id.* at 779 & n.23, 783 (Sobeloff and Bell, JJ., dissenting); *Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 812, 813 & nn.78-88 (1965); Johnson, *supra* note 142, at 150-51 & n.381.

¹⁷⁹ See note 14 *supra* and accompanying text.

¹⁸⁰ REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)). See note 11 *supra* and accompanying text.

¹⁸¹ The 1875 revisers denoted pre-trial removal by stating that the removal petition

Although it might be argued that the revisers rendered the removal remedy impotent by eliminating the after-judgment provision, the Supreme Court in the *Strauder-Powers* decisions endeavored to infuse some meaning into the obscure textual language of the removal provisions.¹⁸² In *Strauder v. West Virginia*,¹⁸³ the first case in the *Strauder-Powers* line of decisions, the allowance of removal was predicated upon a state law discriminatory on its face.¹⁸⁴ In *Virginia v. Rives*,¹⁸⁵ decided the same day as *Strauder*, the Supreme Court emphasized the requirement that removal be accomplished before trial¹⁸⁶ and concluded that removal would be inappropriate when based on an allegation that the defendant could not receive a fair trial in the state courts because of the effects of prejudice¹⁸⁷ or anticipated future misuse or misapplication of the

must be filed "at any time before the trial or final hearing of the cause." REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)). The Supreme Court in the *Strauder-Powers* cases appeared to treat the words "final hearing of the cause" as superfluous, usually designating the time for filing petitions by the words "before trial." *E.g.*, *Kentucky v. Powers*, 201 U.S. 1, 29 (1906); *Gibson v. Mississippi*, 162 U.S. 565, 581 (1896); *Virginia v. Rives*, 100 U.S. 313, 319 (1880). However, it is interesting to note that in *Powers*—which involved the filing of a removal petition immediately prior to the fourth trial after the petitioner had successfully obtained reversals on appeal of his three previous convictions—the petitioner apparently felt it necessary to state that his removal petition could be filed "at any time before final hearing, though there have been previous trial and reversals." 201 U.S. at 19. The filing of removal petitions has now been clarified and made uniform in all civil, 28 U.S.C. § 1446 (b) (1964), and criminal cases, 28 U.S.C. § 1446 (c) (1964).

¹⁸² See generally Amsterdam, *supra* note 178, at 843-50; Johnson, *supra* note 142, at 136-39; Morse, *Civil Rights Removal: "The Letter Killeth, But the Spirit Giveth Life,"* 11 How. L.J. 149, 155-74 (1965); Comment, 44 N.C.L. REV. 380, 385-89 (1966).

¹⁸³ 100 U.S. 303 (1880).

¹⁸⁴ The state law found to be discriminatory on its face was a state statute which restricted jury service to white males over twenty-one years of age. *Id.* at 305. The *Strauder* Court stated that the petitioner "was entitled to immunity from discrimination against him in the selection of jurors . . ." *Id.* at 312. Consequently, the Court felt removal was appropriate since the removal petition "set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State." *Ibid.*

¹⁸⁵ 100 U.S. 313 (1880).

¹⁸⁶ *Id.* at 319-21. The *Rives* Court stated: "The statute authorizes a removal of the case only before trial, not after trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied." *Id.* at 319.

¹⁸⁷ *Id.* at 319-20. In all of the *Strauder-Powers* cases except *Powers*, racial prejudice allegedly motivated the misapplication of the law by the discriminatory selection of jurors. *E.g.*, *Gibson v. Mississippi*, 162 U.S. 565, 585 (1896); *Bush v. Kentucky*, 107 U.S. 110, 117 (1883); *Virginia v. Rives*, 100 U.S. 313, 319-21 (1880). The alleged prejudice in *Powers* was of a political nature. *Kentucky v. Powers*, 201 U.S. 1, 33 (1906). In response to the allegation that effects of prejudice would preclude a fair trial in the state court, the Supreme Court held that since the denial must be one flowing from a legislative impediment (see notes 189-90 *infra* and accompanying text), ascertained "race prejudice interfering with a fair trial was not to be attributed to the constitution

law *during the trial*.¹⁸⁸ Since these alleged denials in the state courts would become clear only after the commencement of the trial, fulfillment of the removal-before-trial requisite would be impossible.¹⁸⁹ However, the Court indicated it would have allowed removal if the petition had been bottomed on a state law or constitution discriminatory *on its face*, reasoning that "the presumption is fair" that the state courts "will be controlled . . . in their decisions" by the facially discriminatory state law or constitutional provision.¹⁹⁰

The utilization of the "presumption" that a future denial would occur in the state courts enabled *Strauder-Powers* to resolve the dilemma created by the antipathetic mandates of the "denial clause."¹⁹¹ While *Rives* did not clearly limit removal to instances

and laws of the State." *Gibson v. Mississippi*, *supra* at 585. Therefore, even if a prospective denial of a fair trial due to the effects of prejudice could be persuasively demonstrated, under the *Strauder-Powers* decisions removal would still not be possible because there would be an insufficient basis for a presumption that a denial would occur in the courts.

¹⁸⁸ "[The removal procedure] . . . does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals." *Virginia v. Rives*, 100 U.S. 313, 319 (1880). See note 191 *infra*.

¹⁸⁹ The justification for refusing to use the fiction of presumption in situations other than those dealing with a facially discriminatory state enactment was premised on the following conclusory reasoning: "In all such cases [in which a facially discriminatory state enactment can be relied upon] a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. . . . The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." *Virginia v. Rives*, *supra* note 188, at 320.

¹⁹⁰ *Id.* at 321.

¹⁹¹ The Court in the *Strauder-Powers* cases employed the presumption of a future denial only in cases dealing with facially discriminatory state enactments. Consequently, removal was allowed only in *Strauder v. West Virginia*, 100 U.S. 303 (1880) (see note 184 *supra*). Compare *Virginia v. Rives*, 100 U.S. 313 (1880). In deciding the issue of the discriminatory aspect of the state enactment under the *Strauder-Powers* decisions, the inquiry went beyond the mere wording of the state enactment. In *Neal v. Delaware*, 103 U.S. 370 (1881), where an existing facially discriminatory state statute was viewed by the Court as having been invalidated by the supervening passage of the fourteenth and fifteenth amendments, removal was disallowed on the following reason-

involving a facially discriminatory state law,¹⁹² the remaining cases in the *Strauder-Powers* line¹⁹³ and those in the lower federal courts appeared to impose this strict threshold criterion.¹⁹⁴ However, acting at the invitation of certain expounders of the 1964 Civil Rights Act to "once again . . . breathe life" into the removal remedy,¹⁹⁵ various courts of appeals have recently proffered conflicting inter-

ing: "The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes." *Id.* at 389-90. Additional inquiry beyond the language of the state law was required in *Bush v. Kentucky*, 107 U.S. 110 (1883), where the Court disallowed removal because the discriminatory state statute, although enacted subsequent to the passage of the fourteenth amendment, had been declared unconstitutional by a state appellate court. *Id.* at 115-16, 122.

A concise expression of the *Strauder-Powers* interpretation of the "denial clause" was rendered by the Court in *Smith v. Mississippi*, 162 U.S. 592 (1896), where removal was denied because "neither the constitution nor the laws of Mississippi, by their language reasonably interpreted, or as interpreted by the highest court of the State, show that the accused was denied or could not enforce in the judicial tribunals of the State" any of his "rights." *Id.* at 600.

¹⁹² See notes 190 *supra* and accompanying text and 201-02 *infra* and accompanying text.

¹⁹³ *E.g.*, *Kentucky v. Powers*, 201 U.S. 1 (1906); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1881). See *Amsterdam*, *supra* note 178, at 843-50; *Comment*, 44 N.C.L. REV. 380, 385-89, 399-402 (1966). The apparent limitation of the removal remedy to cases involving a state law discriminatory on its face can be seen in *Kentucky v. Powers*, 201 U.S. 1 (1906), the last case of the *Strauder-Powers* decisions. In rejecting a removal petition, filed before the petitioner's fourth trial, which asserted denials due to the alleged misapplication of the law in the jury selection process and the failure of the state court to uphold a valid pardon interposed as a defense in three previous trials, the *Powers* Court stated: "It is not contended, as it could not be, that the constitution and laws of Kentucky deny to the accused any rights secured to him by the Constitution of the United States or by any act of Congress. Such being the case, it is impossible, in view of prior adjudications, to hold that this prosecution was removable into the Circuit Court of the United States by virtue of section 641 of the Revised Statutes . . . where the constitution and laws of such State do not permit discrimination against the accused in respect of such rights as are specified in the first clause of section 641." *Id.* at 35.

¹⁹⁴ *E.g.*, *Hull v. Jackson County Circuit Court*, 138 F.2d 820 (6th Cir. 1943); *City of Clarksdale v. Gertge*, 237 F. Supp. 213 (N.D. Miss. 1964); *North Carolina v. Alston*, 227 F. Supp. 887 (M.D.N.C. 1964); *Arkansas v. Howard*, 218 F. Supp. 626 (E.D. Ark. 1963); *City of Birmingham v. Croskey*, 217 F. Supp. 947 (N.D. Ala. 1963); *Hill v. Pennsylvania*, 183 F. Supp. 126 (W.D. Pa. 1960); *Texas v. Dorris*, 165 F. Supp. 738 (S.D. Tex. 1958); *California v. Lamson*, 12 F. Supp. 813 (N.D. Cal. 1935); *New Jersey v. Weinberger*, 38 F.2d 298 (D.N.J. 1930); *White v. Keown*, 261 Fed. 814 (D. Mass. 1919); *Ex parte Wells*, 29 Fed. Cas. 633 (No. 17386) (C.C.D. La. 1878). For additional cases, see *Georgia v. Rachel*, 384 U.S. 780, 802-03 n.29 (1966); *Amsterdam*, *supra* note 178, at 850 n.222; *Johnson*, *supra* note 142, at 140 n.305.

¹⁹⁵ 110 CONG. REC. 2770 (1964) (remarks of Representative Kastenmeier). See, in addition, *id.* at 6551 (remarks of Senator Humphrey); *id.* at 6564 (remarks of Senator Kuchel); *id.* at 6955-56 (remarks of Senator Dodd).

pretations, some sanctioning removal under circumstances assumed to be foreclosed by the reach of *Strauder-Powers*.¹⁹⁶

The *Rachel* Court acknowledged that the *Strauder-Powers* decisions, as consistently interpreted by the lower federal courts,¹⁹⁷ exacted two conditions as prerequisites for removal—namely, an allegation “that the denial would take place in the courts of the State”¹⁹⁸

¹⁹⁶ The Court of Appeals for the Fifth Circuit in *Peacock v. City of Greenwood*, 347 F.2d 679 (5th Cir. 1965), *aff'd in part and rev'd in part*, 384 U.S. 808 (1966), restricted the holding of the *Strauder-Powers* cases to their particular facts, construing them as holding “only that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from grand and petit juries must result from state legislative or constitutional provisions.” 347 F.2d at 683. In allowing removal in advance of trial, on the basis of an alleged denial due to the discriminatory application of valid state enactments, the court stated: “We therefore hold that a good claim for removal under § 1443 (1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination.” *Id.* at 684. The Court of Appeals for the Fourth Circuit in *Baines v. City of Danville*, 357 F.2d 756 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966), expanded the scope of *Strauder-Powers* decisions by sanctioning removal under the following conditions: “[I]f the facts are undisputed or the state's allegations accepted as true, the case is removable if the Constitution would preclude any conviction.” 357 F.2d at 766.

For additional cases, see *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966); *Cox v. Louisiana*, 348 F.2d 750 (5th Cir. 1965); *City of Chester v. Anderson*, 347 F.2d 823 (3d Cir.) (per curiam), *cert. denied*, 384 U.S. 1003 (1966). See generally Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443*, 26 FED. B.J. 99, 136-49 (1966); Comment, 1965 U. ILL. L.F. 100; Comment, 44 N.C.L. REV. 380 (1966); Note, 44 TEXAS L. REV. 200 (1965); Note, 51 VA. L. REV. 950 (1965); 12 HOW. L.J. 158 (1966); 51 IOWA L. REV. 773 (1966); 44 N.C.L. REV. 1152 (1966).

¹⁹⁷ See note 194 *supra*. One explanation for the consistent application of the *Strauder-Powers* doctrine by the lower federal courts is the fact that since 1906 the Supreme Court has not ruled on the removal provisions embodied in section 1443. This result is partially attributable to rules of procedure governing the filing of the removal petitions. As provided in REV. STAT. § 641 (1875) (now 28 U.S.C. § 1443 (1964)), and continued through the Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096, the defendant first filed his petition in the state court where the case was to be tried. If rejected, he could then petition the federal court directly for removal. See, e.g., *Virginia v. Rives*, 100 U.S. 313 (1880). If the federal court disallowed removal, the remand order was nonappealable from 1887 to 1964. See notes 18-19 *supra* and accompanying text. Consequently, as most federal courts were naturally hesitant to terminate proceedings in a state court which had just rejected the removal petition, the defendant's only alternative was to have his exception to the remand order made part of the record which might eventually be reviewed by the Supreme Court. See, e.g., *Neal v. Delaware*, 103 U.S. 370 (1881). Under this route two main considerations militate against the probability that the Supreme Court would directly confront the removal provisions: (1) the case would only be reviewed after a final adverse judgment by the state court; and (2) the exception to the state court ruling might be merely one of the many federal issues before the Court. After the 1948 revision, removal could be sought by an initial filing in the federal court. Furthermore, filing stayed state court proceedings which could be resumed only if the federal court remanded the case. 28 U.S.C. §§ 1446-47 (1964). See Amsterdam, *supra* note 178, at 845-49 nn.211, 215, 217.

¹⁹⁸ *Georgia v. Rachel*, 384 U.S. 780, 803 (1966). (Emphasis added.) The result of the

and a demonstration that the "denial [is] . . . manifest in a formal expression of state law."¹⁹⁹ Nevertheless, *Rachel* rejected the limited view of *Strauder-Powers* which predicated removal solely upon a state law discriminatory on its face;²⁰⁰ rather, the Court seized upon the brief dictum in *Rives* which stated that the requisite denial must result "primarily, if not exclusively, . . . from the Constitution or laws of the State . . ."²⁰¹ *Rachel* therefore concluded that "removal might be justified, even in the absence of a discriminatory state enactment, if an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specific federal rights in the state court."²⁰²

In attempting to ascertain the existence of a firm prediction that a denial would occur in the state tribunals,²⁰³ the Court examined

Strauder-Powers decisions appears to be the most restrictive interpretation of the words "in the courts of such State." 28 U.S.C. § 1443 (1) (1964). The petitioner in *Kentucky v. Powers*, 201 U.S. 1 (1906), was granted a fourth trial after his three previous convictions by a lower court had been reversed. Although removal was sought for the same alleged denial asserted at his three other trials, the Supreme Court stated that removal was inappropriate regardless of strong indications that the lower state court would repeat the alleged denial. The *Powers* Court felt that alleged denials by lower state courts should be corrected by the revisory power of the state courts and not by the procedure of removal. *Id.* at 35-40; see *Virginia v. Rives*, 100 U.S. 313, 322 (1880). This interpretation of the words "in the courts of such State" as meaning *all* state courts has been supported by the Court of Appeals for the Fourth Circuit, as follows: "It would appear that the requirement of a showing of inability to enforce protected rights in the courts would require us to view all of its courts vertically, and that even a successful showing of unfairness in the trial court would not be sufficient unless it were also shown that the appellate court was unfair, too, or that the unfairness of the trial court was not correctable on appeal or avoidable by change of venue." *Baines v. City of Danville*, 357 F.2d 756, 769 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). See *Amsterdam*, *supra* note 178, at 856-59; note 203 *infra* and accompanying text.

¹⁹⁹ *Georgia v. Rachel*, *supra* note 198, at 803.

²⁰⁰ *Id.* at 803-05.

²⁰¹ *Virginia v. Rives*, 100 U.S. 313, 319 (1880). (Emphasis added.) See, e.g., *Gibson v. Mississippi*, 162 U.S. 565, 581 (1896); *Neal v. Delaware*, 103 U.S. 370, 387 (1881).

²⁰² 384 U.S. at 804. In rejecting the traditional interpretation by lower federal courts and commentators that *Strauder-Powers* allowed for removal only for a facially discriminatory state enactment (see notes 193-94 *supra*), *Rachel* grounded its decision on the "primarily, if not exclusively" language of *Rives*. See note 201 *supra* and accompanying text. The *Rachel* Court apparently ignored, however, the explicatory sentence immediately following the "primarily, if not exclusively" language: "In other words, the statute has reference to a legislative denial or an inability resulting from it." *Virginia v. Rives*, 100 U.S. 313, 319-20 (1880). (Emphasis added.) For a circumvention of the *Strauder-Powers* doctrine by a liberal definition of the *Rives* reference to "legislative denial or an inability resulting from it," see *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966).

Mr. Justice Douglas, dissenting in *Peacock*, opted for a more forthright approach, urging that the "irrationality of the [*Strauder-Powers*] . . . requirement that removal be predicated on a facially unconstitutional statute" should not be followed. 384 U.S. at 849 & n.13 (1966) (Douglas, J., dissenting).

petitioners' allegations²⁰⁴ in light of section 203 (c) of the 1964 Civil Rights Act,²⁰⁵ which provides that "no person shall . . . punish or attempt to punish any person" for peaceful attempts to integrate places of public accommodation covered by the 1964 Act.²⁰⁶ In *Hamm v. City of Rock Hill*,²⁰⁷ the Supreme Court had said that this proscription against an "attempt to punish" meant that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act [were] immunized from prosecution . . ."²⁰⁸ Therefore, applying its own broad interpretation of *Hamm*,²⁰⁹ the Court in *Rachel* con-

²⁰⁴ See note 202 *supra* and accompanying text. One issue left unresolved by both *Rachel* and *Peacock* is whether the phrase of the removal statute "is denied or cannot enforce in the courts of such State a right" means that the denial must occur only in the first court in which the petitioners are tried or in all state courts up to and including the highest state court. This latter view was adopted by the Court in the *Strauder-Powers* decisions. See *Kentucky v. Powers*, 201 U.S. 1, 35-40 (1906); note 198 *supra*. It has also been maintained by some courts of appeals. *E.g.*, *Baines v. City of Danville*, 357 F.2d 756, 769-70 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). Since any proceedings in any state court would have constituted a denial in *Rachel*, the inquiry into the possible actions of appellate state courts was irrelevant to the removal decision by the *Rachel* Court. 384 U.S. at 805-06. *Peacock* disallowed removal because it would not indulge in a presumption that any state court might effect a denial. 384 U.S. at 827-28. Consequently, it likewise avoided the question as to where in the state court system the presumed denial must occur.

²⁰⁵ *Georgia v. Rachel*, 384 U.S. 780, 782-84 (1966); see notes 26-30 *supra* and accompanying text.

²⁰⁶ 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.).

²⁰⁷ Civil Rights Act of 1964, § 203 (c), 78 Stat. 244, 42 U.S.C. § 2000a-2 (c) (1964). (Emphasis added.) For the full text of §§ 201-03, see note 32 *supra*.

²⁰⁸ 379 U.S. 306 (1964).

²⁰⁹ *Id.* at 311. (Emphasis added.)

²¹⁰ *Georgia v. Rachel*, 384 U.S. 780, 804-06 (1966). Besides the statement that "nonforcible attempts [were] . . . immunized from prosecution," *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964), *Hamm* declared that the "punish or attempt to punish" language "prohibits prosecution of any person for seeking service in a covered establishment, because of his race or color." *Ibid.* Whether this means a successful "prosecution" as opposed to any "prosecution" is left unclear by the additional discussion of the right to use the 1964 Act as a defense to a prosecution in the state courts. *Id.* at 309-15. Consequently, a broad construction might view *Hamm* as prohibiting any prosecution in a state court, while a narrower interpretation arguably could consider *Hamm* as only providing a defense to a prosecution.

One court, in analyzing the "attempt to punish" language, stated: "There is nothing in this express interdiction which could be construed as meaning that appellants may be punished by prosecution in a state trial court so long as they may later vindicate their right not to be punished in a state appellate court or in the United States Supreme Court." *Dilworth v. Riner*, 343 F.2d 226, 231 (5th Cir. 1965). It was this broader, more potent construction that *Rachel* adopted in construing the language of *Hamm*. The Court concluded that *Hamm* clearly stated the "attempt to punish" language protected persons engaged in protected activity under the 1964 Act "not only from conviction in state courts, but from prosecution in those courts." 384 U.S. at 804. If *Rachel* had taken the narrower view that *Hamm* sanctioned the use of the 1964 Act only as a defense to a prosecution, then the fact that the state of Georgia prior to

cluded that if the petitioners' allegations were determined to be true, then *any* proceedings in the state court, no matter what the outcome thereof, would constitute a denial.²¹⁰ Furthermore, in order to accomplish removal before trial and still posit that the denial is *in* the state courts,²¹¹ *Rachel* impliedly employed the presumption that the pending proceedings would not be terminated short of trial, such as would occur if the prosecution dropped the charges.²¹²

Although *Rachel* indicated that it was not endorsing all of the language of the *Strauder-Powers* cases,²¹³ the Court nevertheless felt

Rachel had upheld the 1964 Act when faced with an illegally brought trespass case (*Bolton v. Georgia*, 220 Ga. 632, 140 S.E.2d 866 (1964)) would have been relevant regarding a prediction as to what actions the state court might take in the petitioners' case in *Rachel*. Because *Rachel* did in fact take the broader view of *Hamm*, the Court concluded that "the burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 . . ." 384 U.S. at 805. Therefore, if the petitioners' allegations are true, *Rachel* reasoned that "any proceedings in the courts of the State will constitute a denial . . ." *Id.* at 804. See 1965 DUKE L.J. 813, 818 n.44; 1965 DUKE L.J. 640.

²¹⁰ 384 U.S. at 804-06.

²¹¹ *Id.* at 803-06. Although *Rachel* never explicitly stated that the removal statute required the denial to be an in-court denial, the Court continually discussed denials in those terms. For example, *Rachel* considered removal to be appropriate "if an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court." *Id.* at 804. (Emphasis added.) See note 198 *supra* and accompanying text for the presentation of the *Strauder-Powers* approach to the apparent requirement of in-court denials.

²¹² The presumption that the charges will not be dropped appears to be sanctioned by the wording of the removal statute itself which provides for removal of a case "to the district court of the United States for the district and division embracing the place wherein it is pending . . ." 28 U.S.C. § 1443 (1964). (Emphasis added.) On the other hand, if there should be an attempt to circumvent the *Rachel* decision by taking no action other than merely unlawfully detaining a "suspect" for the purpose of harassment, it would appear that the individual so held could successfully seek relief in the federal courts by a writ of habeas corpus, once he had exhausted effective state remedies. See 28 U.S.C. §§ 2241-55 (1964). See generally Amsterdam, *supra* note 178, at 882-912.

In some situations the issue of whether or not the case is "pending" might be clouded by state court procedural practices. Such a situation existed in *State v. Klopfer*, 266 N.C. 349, 145 S.E.2d 909, cert. granted, 384 U.S. 959 (1966), in which the prosecutor was granted a *nolle prosequi* with leave of the court after the first trial resulted in a hung jury. In some such cases, as was true in *Klopfer*, a considerable length of time might lapse without the scheduling of a new trial. In this situation, if the charges were not officially dropped, it would appear that the petitioner could obtain removal; for his case, based on the original indictment, would still be "pending," notwithstanding the prosecutor's declarations of an intent never to retry the defendant.

²¹³ *Rachel* did not limit the removal procedure to *Strauder-Powers*' apparent demand that the denial be predicated upon a facially discriminatory state law. 384 U.S. at 803-04; see notes 197-202 *supra* and accompanying text. Nevertheless, in *Peacock* the Court indicated its desire to retain the conceptual approach to the removal remedy taken by the *Strauder-Powers* cases as follows: "We need not and do not necessarily approve or adopt all the language and all the reasoning of every one of this Court's opinions construing this removal statute [in the *Strauder-Powers* cases] . . . but we

that its restrictive interpretation produced beneficial results, which *Rachel* desired to perpetuate through the use of the concept of "an equally firm prediction."²¹⁴ That is to say, removal on the basis of a facially discriminatory state law would limit the remedy to those cases "where the predicted denial appeared with *relative clarity* prior to trial."²¹⁵ It is true that, by the implementation of *Rachel's* theory of "an equally firm prediction" based on the "attempt to punish" language, the future denial will appear only after the foundations of the charges—whether or not the defendants had engaged in protected activity within the terms of the 1964 Act—have been decided on the merits at the evidentiary hearing.²¹⁶ Nevertheless, once it is ascertained that the charges in fact contravene the 1964 Act, *any* proceedings in the state court constitute forbidden prosecutions.²¹⁷ A "denial" thus occurs upon the commencement of proceedings in the state courts and any speculation regarding the probable action of the state court is thereby obviated. Indeed, it was this latter consideration which the *Rachel* Court found to be the most attractive feature of the *Strauder-Powers* approach.²¹⁸ More specifically, *Rachel's* objective was to construct a theory to enable the federal courts to predict a future denial in the state courts but at the same time to

decline to repudiate those decisions . . . because . . . those decisions were correct in their basic conclusion that the provisions of § 1443 (1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law." *City of Greenwood v. Peacock*, 384 U.S. 808, 831 (1966).

²¹⁴ 384 U.S. at 804.

²¹⁵ *Id.* at 803. (Emphasis added.) *Rachel* classified *Strauder-Powers* theory of prediction as one based on "relative clarity" and its own theory of prediction as one founded on a "firm prediction." *Id.* at 803-04. The distinction between these designations is that under *Rachel's* interpretation of the 1964 Act, once a federal court has decided that there will be a denial if any proceedings are instituted in the state court, then a denial is inevitable without speculation as to the likely behavior of the state court. On the other hand, to implement its theory of prediction, the *Strauder-Powers* Court had to presume that the state courts would uphold the facially discriminatory state enactment. The Court, however, did not intimate that divergent effects would flow from these two different formulations.

²¹⁶ *Rachel* noted that at the evidentiary hearing the federal court would have to decide if the defendants had been ejected for racial reasons, if they were engaged in protected activity, and ultimately if their actions were immunized from prosecution within the terms of the 1964 Act. *Id.* at 805-06; see *id.* at 807 (Douglas, J., concurring). Consequently, *Rachel* demanded a full evidentiary hearing into the merits of the case by directing the federal district court, once it had accepted the case on removal, to dismiss the prosecution if it found petitioner's allegations to be sustained by the evidence. *Id.* at 805-06. See *Hartfield v. Mississippi*, 367 F.2d 362 (5th Cir. 1966) (per curiam).

²¹⁷ 384 U.S. at 804; see notes 208-12 *supra* and accompanying text.

²¹⁸ 384 U.S. at 803-05.

prevent federal judges from becoming embroiled in detailed analyses of the probable adjudication of federal claims by the state courts, thereby avoiding the unseemly task of prejudging the actions of state judges.²¹⁹ While this implication of *Strauder-Powers* may initially appear persuasive, it remains that *Strauder-Powers* avoided a detailed inquiry into possible state court behavior only by engaging in the most blatant form of prejudging, conclusively presuming that state court judges would uphold extant discriminatory state enactments.²²⁰ *Rachel*, however, avoided both the detailed analysis and the consequent prejudging intrusions by instructing the district court to decide the merits of the case at the evidentiary hearing.²²¹

While an initial impression may suggest that *Rachel* significantly expanded the *Strauder-Powers* doctrine by means of the "equivalent basis" formula, any such tendencies were summarily rejected by the Court in *Peacock*. In response to the petitioners' allegations that the criminal charges against them were instituted to deter their civil rights activity in assisting Negroes to register to vote,²²² the Court asserted that the petitioners could point to "no federal law [which] confers an absolute right on [anyone] . . . to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman."²²³ Unfortunately, the

²¹⁹ *Id.* at 803-04; see *City of Greenwood v. Peacock*, 384 U.S. 808, 828, 832, 834 (1966); note 254 *infra*. *Strauder-Powers* unwillingness to engage in some forms of prejudging was expressed as follows: "When [the defendant] . . . has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. . . . The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." *Virginia v. Rives*, 100 U.S. 313, 320 (1880). Aversion to prejudging state courts and judges was expressed by the Court of Appeals for the Fourth Circuit, as follows: "When the question is what the state court will do in the future, as it must be, it is usually incapable of any certain answer. It is the kind of inquiry which would be most disruptive of federal-state relations and the greatest hindrance to state court processes." *Baines v. City of Danville*, 357 F.2d 756, 770 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966). Compare *Amsterdam*, *supra* note 178, at 857-59, 911-12, with *Johnson*, *supra* note 196, at 152-55.

²²⁰ See notes 189-90, 215 *supra* and accompanying text.

²²¹ See note 216 *supra* and accompanying text.

²²² *City of Greenwood v. Peacock*, 384 U.S. 808, 811-14 (1966). See notes 35-36 *supra* and accompanying text.

²²³ 384 U.S. at 826-27. *Peacock*, on the other hand, concluded that the right to be free of an "attempt to punish" as granted by the 1964 Act and construed by *Hamm* (see notes 208-10 *supra*) "specifically and uniquely" provided the petitioners in *Rachel* with an "absolute right" to violate the Georgia anti-trespass statute with impunity by their allegedly protected actions. 384 U.S. at 826 (see notes 208-10 *supra* and accompanying

Court's characterization of the issue begs the question by assuming the conclusion. Of course, no one has an "absolute right" to perform criminal acts.²²⁴ On the other hand, if one is engaged in protected activity, he necessarily may not be successfully prosecuted. Thus, in *Rachel* the "absolute right" to trespass in violation of Georgia's anti-trespass law emerged *only after* it was determined that the activity involved therein was protected by the 1964 Act.²²⁵ Likewise, if the petitioners in *Peacock* could prove at the hearing that the charges against them were baseless, indeed that they had been engaged in federally protected activity, then their "absolute right" to participate in the particular activity would apparently be as viable as the analogous right in *Rachel*.²²⁶ Thus, if the Court sanctioned an evidentiary hearing on the merits in *Rachel*, the demand in *Peacock* for the demonstration of an a priori "absolute right" would appear to be based upon a distinction without substance.²²⁷

However, the denial of an evidentiary hearing in *Peacock* evidently was based ultimately upon the Court's belief that the petitioners could invoke "no federal law [which] confers immunity from state prosecution"²²⁸ This conclusion was reached in spite of the fact that the petitioners relied upon a section of the 1957 Civil Rights Act²²⁹ which makes it a crime to "intimidate, threaten, coerce,

text). *Rachel* noted that *Hamm* had construed the right to be free of an "attempt to punish" as substituting "a right for a crime." 384 U.S. at 805.

²²⁴ See Note, 51 VA. L. REV. 950, 967-68 n.72 (1965).

²²⁵ See note 216 *supra* and accompanying text.

²²⁶ It should make little difference that the petitioners in *Peacock* (see notes 35-36 *supra* and accompanying text) as compared with the petitioners in *Rachel* (see notes 26-30 *supra* and accompanying text) were charged with crimes whose assigned names would not connote a direct connection between the crime and the alleged protected activity. In *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), the Supreme Court recognized that a right under the 1964 Act "to trespass" by peacefully entering and remaining in establishments covered by the act might be subject to abridgment by the unconstitutional application of laws other than anti-trespass statutes. Noting that the 1964 Act "would be a defense to criminal trespass, breach of the peace and similar prosecutions," *Hamm* stated that "in effect the Act prohibits the application of state laws in a way that would deprive any person of the rights granted under the Act." *Id.* at 311.

²²⁷ See *City of Greenwood v. Peacock*, 384 U.S. 808, 848 n.12 (1966) (Douglas, J., dissenting).

²²⁸ *Id.* at 827 & n.25. But see *id.* at 843 n.10 (Douglas, J., dissenting). *Peacock* noted that the petitioners in *Rachel* could rely on a law that conferred immunization from prosecution since the 1964 Act as construed by *Hamm* specifically immunized the alleged conduct of the petitioners from any proceedings in the state court. *Id.* at 826; see notes 208-10 *supra* and accompanying text.

²²⁹ Civil Rights Act of 1957, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.).

or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote"²³⁰ While the foregoing language may appear to be more sweeping and encompassing than the "punish" or "attempt to punish" formula,²³¹ the Court in *Peacock* was apparently unwilling to engraft a *Hamm*-type construction onto it to secure absolute immunity from prosecution.²³² Therefore, to have allowed removal would have involved a federal court's deciding not only that these arrests and pending prosecutions were a form of denial by intimidation but also that the denial was "for the purpose of interfering" with the exercise of protected activity.²³³ Consequently, if removal was to be found appropriate within the Court's demand for in-court denials, a federal court would have been required to ascertain the corruptness of the officers' motives at the arrest and indictment stage and to have predicted that the state court would not find these motives corrupt.²³⁴ These two inquiries would have involved a

²³⁰ Civil Rights Act of 1957, § 131, 71 Stat. 637, 42 U.S.C. § 1971 (b) (1964). See notes 39, 124 *supra* and accompanying text.

²³¹ A removal petition relying on the "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce" language of § 131 of the 1957 Act was disallowed in *North Carolina v. Hawkins*, 365 F.2d 559 (4th Cir.) (per curiam), *cert. denied*, 385 U.S. 949 (1966). Judge Sobeloff, concurring specially, felt that removal was inappropriate on the basis of his understanding that *Peacock* viewed only the "punish or attempt to punish" language of the 1964 Act as providing immunization from state prosecution. 365 F.2d at 562-63. Nevertheless, Judge Sobeloff asserted: "Section 1971 (b) of the voting rights provisions employs a more general prohibition against any attempted intimidation, threats, or coercion [than the 'punish or attempt to punish' language] by persons 'acting under color of law or otherwise.' Literal comparison of the two provisions suggests that § 1971 (b) is a more, not less, sweeping prohibition of official acts of harassment against equal civil rights than the limited proscription of § 203 (c), since 'attempts to punish' are only one means of coercing, threatening, or intimidating." *Id.* at 562.

²³² Although denying removal on the basis of the holdings in *Rachel* and *Peacock*, Judge Sobeloff, concurring specially, in *North Carolina v. Hawkins*, 365 F.2d 559, 562 n.7 (4th Cir.) (per curiam), *cert. denied*, 385 U.S. 949 (1966), criticized the Court's decision in *Peacock*, as follows: "In other words, § 1971 (b) of the voting rights provisions seems to express in different language the principle, contained in § 203 (c) of the public accommodations clauses—that the states, acting through state officials are forbidden to employ any form of attempted intimidation, coercion, or threats, including 'attempts to punish.' Thus, § 1971 (b) performs the same function as § 203 (c), and suggests that the two clauses should be given the same effect. In this view the Supreme Court's interpretation of § 203 (c) in *Hamm v. City of Rock Hill*, . . . 379 U.S. 306 (1965), would apply with equal force to the prohibitions of § 1971 (b). It is difficult to conceive that Congress intended to place voting rights guarantees on a lower plane of protection than the right to equal public accommodations."

²³³ See Civil Rights Act of 1957, § 131, 71 Stat. 637, 42 U.S.C. § 1971 (b) (1964).

²³⁴ In expressing its reasons for rejecting the removal petitions in *Peacock*, the Court stated: "The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is inno-

federal court in a presumption that *Peacock* was unwilling to sanction.²³⁵ On the other hand, even if the allegedly baseless charges and corrupt misapplications of the law constituted *present denials*,²³⁶ *Peacock* felt they should more appropriately be corrected before trial by the process of injunction²³⁷ and not by removal.

cent, or that in any other manner the defendant will be 'denied or cannot enforce in the courts' of the State any right under a federal law providing for equal civil rights." 384 U.S. at 827-28.

²³⁵ The objectionable features envisioned by the Court as necessarily flowing from allowing removal for alleged denials in *Peacock* were characterized as follows: "On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendants' innocence or guilt." 384 U.S. at 832. *Peacock* might have reasoned that its disallowance of removal was compatible with the approach taken in the *Strauder-Powers* decisions. In those cases, the Supreme Court was unwilling to assume that the state courts would not correct the criminal misuse of laws during trial by corrupt court officials. *E.g.*, *Gibson v. Mississippi*, 162 U.S. 565, 584 (1896); *Virginia v. Rives*, 100 U.S. 313 (1880); see note 188 *supra*. Allowing removal in *Peacock* would have required the Court to anticipate the alleged motives of officers and the state courts' determinations regarding these motives. Consequently, since *Rachel* and *Peacock* demanded the denial to occur in the court, the Supreme Court might have felt that it was upholding the *Strauder-Powers* approach by not employing a presumption regarding the issue of officers' motivations in advance of trial and future state court resolutions of these motivations.

²³⁶ In construing the language of the removal statute—"is denied or cannot enforce in the courts of such State a right . . ."—the dissenting opinion reached the conclusion that the procedure provided removal for two types of denials, to wit: "The words 'is denied' refer to a *present* deprivation of rights while the language 'cannot enforce' has reference to an *anticipated* state court frustration of equal civil rights." *City of Greenwood v. Peacock*, 384 U.S. 808, 841 (1966) (Douglas, J., dissenting). See *Baines v. City of Danville*, 357 F.2d 756, 773-88 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966) (Sobeloff and Bell, JJ., dissenting). After arguing for removal on the basis of present denials, whether they occur in the courts of the state or not, 384 U.S. at 841-44, the dissent asserted that the petitioners should be granted removal even under a more restrictive application of the "is denied" approach: "[T]he present cases constitute denials of federal civil rights 'in the courts' of the offending State within the meaning of § 1443 (1), for the local judicial machinery is implicated even prior to actual trial by issuance of a warrant or summons, by commitment of the prisoner, or by accepting and filing the information or indictment." *Id.* at 844-45. However, in the *Strauder-Powers* decisions, the Supreme Court disallowed removal in cases involving alleged denials in the procurement of indictments by misapplications of the law prior to trial. *E.g.*, *Williams v. Mississippi*, 170 U.S. 213 (1898); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Bush v. Kentucky*, 107 U.S. 110 (1883). The Court designated the revisory power of the state's highest court as the proper avenue for relief. See *Kentucky v. Powers*, 201 U.S. 1, 37 (1906); *Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 843-44 & n.202 (1965); *Johnson, supra* note 196, at 137 & n.228.

²³⁷ 384 U.S. at 829. For recent re-evaluations of the use of the injunction procedure in civil rights cases, see *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965); *Bush v. Orleans Parish Schools Bd.*, 194 F. Supp. 182 (E.D. La. 1961), *aff'd per curiam sub nom. Gremillian v. United States*, 368 U.S. 11

Some consideration might profitably be given at this point to an analogous provision of the 1965 Voting Rights Act²³⁸ which proscribes intimidation of any persons attempting to vote or urging others to vote.²³⁹ Although it is unclear from the *Peacock* opinion whether the Court did in fact reject the 1965 Act as a basis for removal,²⁴⁰ it is arguable that no satisfactory distinction for removal purposes can be drawn between a denial predicated upon the "intimidate" phraseology of that section and the "attempt to punish" language of the 1964 Civil Rights Act.²⁴¹ It should be noted initially that the 1965 Act, unlike its 1957 counterpart,²⁴² makes no reference to the *purpose* for which those who intimidate must act in order to fall within the statutory proscription.²⁴³ Thus, if the removal petition alleged deprivation of the statutory right to be free from intimidation for exercising or aiding others to exercise the right of suffrage, no inquiry into the motives of the alleged perpetrators would be required.²⁴⁴ *Rachel* instructed the district court to determine at a

(1961). See generally Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71 (1965); Comment, 65 COLUM. L. REV. 647 (1965); Comment, 114 U. PA. L. REV. 561 (1966); Note, 1965 DUKE L.J. 813; Note, 78 HARV. L. REV. 994 (1965).

²³⁸ Voting Rights Act of 1965, 79 Stat. 437 (codified in scattered sections of 42 U.S.C.).

²³⁹ Voting Rights Act of 1965, § 11 (b), 79 Stat. 443, 42 U.S.C. § 1973i (b) (Supp. I, 1965). See statutory text in note 124 *supra*.

²⁴⁰ The Court is unclear both as to whether the 1965 Voting Rights Act falls within the ambit of the generic phrase (see note 124 *supra*) and whether the act was included within the terms of its concept of "an equally firm prediction." The conclusion in *Peacock* that "no federal law confers immunity from state prosecutions on such charges," 384 U.S. at 827, was seemingly reiterated in a footnote where the Court stated that none of the laws invoked by the petitioners contained "punish or attempt to punish" language. *Id.* at 827 n.25. Since the petitioners did not rely on the 1965 Voting Rights Act, which was passed subsequent to the filing of the petitioners' removal petitions, it is arguable that the Court never evaluated the 1965 Act in terms of its concept of "an equally firm prediction."

²⁴¹ Civil Rights Act of 1964, § 203, 78 Stat. 244, 42 U.S.C. § 2000a-2 (1964). The full text of the "attempt to" language of the 1964 Act is contained in note 32 *supra*.

²⁴² See notes 39, 229-30 *supra* and accompanying text.

²⁴³ Both the "attempt to intimidate" language of the 1965 Voting Rights Act (see note 124 *supra*) and the "with the purpose of interfering with" phraseology of the Civil Rights Act of 1957 (see note 39 *supra*) would apparently require the federal court to engage in what *Peacock* viewed as an objectionable inquiry into the motives of the arresting officers. See notes 233-35 *supra* and accompanying text.

²⁴⁴ The only inquiry into mental state will arise when the federal court resolves the issue of whether the petitioner is a victim of intimidation, threats, or coercion, unencumbered by the additional inquiry into the alleged motives of persons supposedly engaging in an "attempt to intimidate, threaten, or coerce." Nevertheless, inasmuch as *Peacock* was unwilling to delve into the motives of arresting officers (384 U.S. at

hearing if the charges were groundless and whether or not the petitioners were engaging in protected activity.²⁴⁵ Therefore, it is suggested that an evidentiary hearing be used to determine if the charges against the petitioners are baseless, if they are engaging in protected activity and if the wrongfully brought charges intimidate the petitioners. If the answers to these three inquiries are in the affirmative, then arguably removal should be allowed even without a *Hamm*-type statutory construction. Under this suggested approach, a federal court must indulge in the presumption at the evidentiary hearing that these prosecutions will intimidate the defendant when the proceedings are instituted.²⁴⁶ However, if the pending prosecutions constitute an intimidation in the initial stages of the arrest and indictment, then it would not appear difficult to posit that a materialization of the actual prosecution by in-court proceedings would be a prolongation of the intimidation.²⁴⁷ Thus, the moment the proceedings are instituted they would constitute a denial *in the courts* of the state, as any proceedings would be a form of intimidation.²⁴⁸ Under this presumption, the denial would be accomplished regardless of what the state judge did, thereby avoiding the necessity of any federal judge prejudging the possible actions of any state judge. Once the

827-28, 832; notes 234-35 *supra* and accompanying text), it is arguable that the Court would decline to determine matters dealing with the state of mind of the petitioner, notwithstanding the fact that *Rachel* sanctioned an evidentiary hearing which would have involved the discernment of the arresting officers' motives (see notes 216, 225 *supra* and accompanying text).

²⁴⁵ See notes 216, 225 *supra* and accompanying text.

²⁴⁶ See note 247 *infra* and accompanying text.

²⁴⁷ In dissent, Mr. Justice Douglas stated: "For reasons not clear, a baseless prosecution, designed to punish and deter the exercise of such federally protected rights as voting, is not seen by the majority to constitute a denial of equal civil rights." 384 U.S. at 847. It appears that the approach advocated by Douglas contained two features found to be objectionable by the majority. Removal on the basis of allegedly present denials would be a complete disregard of the in-court denial requirement. Secondly, Mr. Justice Douglas was opting for an evidentiary hearing to ascertain if there was a denial by the state's "attempt to" misuse or misapply its laws, a type of denial founded on motives. See note 244 *supra* and accompanying text. On the other hand, it is suggested that if the inquiry at the hearing were directed toward the issue of whether the charges were baseless and would intimidate the petitioner at the time of commencement of any proceedings in the state court, then the majority's conceptual approach to in-court denials and motivations would not be thwarted.

²⁴⁸ In resolving issues dealing with the use of injunctions in civil rights cases, the Supreme Court has warned that "the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). The identical thought was expressed by Mr. Justice Douglas, dissenting in *Peacock*, where he said: "Continuance of an illegal prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights." 384 U.S. at 845.

federal court has assumed that the intimidation will remain intact through the initial proceedings, the court has only to entertain the same presumption utilized in *Rachel*—namely, that the charges will not be dropped.²⁴⁹

The foregoing argument, however tenuous, illustrates the con-tortive approach necessary to obtain removal in view of the Court's restrictive rendition of section 1443. Thus *Rachel* and *Peacock* effectively foreclosed the possibility of removal based upon an allegation that petitioners would not receive a fair trial because of a prejudiced judge or jury.²⁵⁰ Since the Court was unwilling to indulge in any prejudging of state officials or institutions,²⁵¹ if one alleged that the jury would be prejudiced,²⁵² apparently the Court would assume that the state judge would correct the situation by such measures as change of venue and delay of trial.²⁵³ Furthermore, *Rachel's* expressed aversion to federal judges prejudging the behavior of state court judges was emphasized by *Peacock*, which concluded that the removal statute clearly forbade such an exercise.²⁵⁴ If in fact either

²⁴⁹ See note 212 *supra* and accompanying text.

²⁵⁰ *City of Greenwood v. Peacock*, 384 U.S. 808, 827-29 (1966). Local prejudice was originally allowed as a basis for removal. *State v. Dunlap*, 65 N.C. 491 (1871); *Gaines v. State*, 39 Tex. 606 (1873). It was later specifically rejected. *Fitzgerald v. Allman*, 82 N.C. 492 (1880) (overruling *Dunlap*); *Texas v. Gaines*, 23 Fed. Cas. 869 (No. 13847) (C.C.W.D. Tex. 1874) (denial of removal despite *Gaines v. State*). An allegation founded on local prejudice was considered insufficient under the *Strauder-Powers* cases. *E.g.*, *Gibson v. Mississippi*, 162 U.S. 565, 585 (1896); *Virginia v. Rives*, 100 U.S. 313, 319-21 (1880). See note 187 *supra* and accompanying text.

Nevertheless, removal on the basis of prejudice is not unknown. It was guaranteed by Act of July 27, 1866, ch. 288, 14 Stat. 306, as amended by Act of March 2, 1867, ch. 196, 14 Stat. 558, but was dropped in the revision of 1948. Reviser's Note, 28 U.S.C. § 1441 (1964); 44 N.C.L. REV. 380, 384 & n.17 (1966). "There is wisdom in removal from State to Federal Court, as evidenced by the constant stream of removals. Removal is intended to promote justice, and does so insofar as local influence and prejudice are concerned . . ." BOULWARE, GUIDE TO REMOVAL AND ITS PREVENTION 1 (1948). See generally FRANKFURTER & LANDIS 8-13.

Although differing somewhat in approach, various commentators have supported the concept of local prejudice being the foundation of a sufficient removal petition. See Amsterdam, *supra* note 236, at 805-06 & n.52, 858, 911-12; Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443*, 26 FED. B.J. 99, 138, 142, 153-54 (1966); Comment, 1965 U. ILL. L.F. 100; Note, 54 HARV. L. REV. 679 (1941); Note, 19 ST. JOHN'S L. REV. 43 (1944); Note, 51 VA. L. REV. 950, 971-72 (1965).

²⁵¹ See note 219 *supra* and accompanying text.

²⁵² See *Wansley v. Virginia*, 368 F.2d 71 (4th Cir. 1966) (pre-trial adverse publicity); *City of Birmingham v. Corskey*, 217 F. Supp. 947 (N.D. Ala. 1963) (pre-trial prejudicial publicity and prejudicial statements by public officials); *State v. Bobb*, 138 Me. 242, 25 A.2d 229 (1942) (pre-trial prejudicial publicity). See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1964).

²⁵³ *City of Greenwood v. Peacock*, 384 U.S. 808, 827-29 (1966).

²⁵⁴ *Rachel's* desire to avoid the "unseemly process" of federal judges prejudging state

judge or jury were corrupt, the Court felt that the error should be corrected by a federal writ of habeas corpus or an appeal to the Supreme Court.²⁵⁵

CONCLUSION

Although some legislators had suggested during the debates on the 1964 Civil Rights Act that the courts should "once again . . . breathe life" into the removal procedure,²⁵⁶ the resulting re-evaluation by *Rachel* and *Peacock* was a restrictive construction of the remedial provisions of section 1443 (1).²⁵⁷ Beyond possible reliance upon the intimidation language of the 1965 Voting Rights Act,²⁵⁸ the Supreme Court appeared to foreclose all channels for removal except in instances involving a facially discriminatory state enactment as provided for in *Strauder-Powers*²⁵⁹ or a right to be free from an "attempt to punish" as detailed in *Rachel*.²⁶⁰ The underlying concern of the Court which produced this restrictive construction was the potential, radical shift in the jurisdictional balance between the state and federal courts. The majority in *Peacock* did not doubt that Congress has the constitutional power to alter this aspect of the federal system.²⁶¹ The Court warned, however, that any extension of the removal remedy should not overlook two considerations: (1) whether the past performance of the state courts necessitates a radical

judges, 384 U.S. at 803-04; text accompanying note 219 *supra*, was phrased in *Peacock* as follows: "The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial." 384 U.S. at 828.

²⁵⁵ *Id.* at 828-29. See notes 266, 274 *infra*. See generally Wilson, *Federal Habeas Corpus and the State Court Criminal Defendant*, 19 VAND. L. REV. 741 (1966).

²⁵⁶ 110 CONG. REC. 2770 (1964) (remarks of Representative Kastenmeier). See note 195 *supra* and accompanying text.

²⁵⁷ A concise definition of the restrictive construction proffered by the Court in *Peacock*, is as follows: "Under § 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." 384 U.S. at 828. For subsequent cases applying the restrictive standards enunciated in *Rachel* and *Peacock*, see, e.g., *Wansley v. Virginia*, 368 F.2d 71 (4th Cir. 1966); *Boynton v. Alabama*, 366 F.2d 511 (5th Cir. 1966) (per curiam); *Townsend v. Ohio*, 366 F.2d 33 (6th Cir. 1966) (per curiam); *North Carolina v. Hawkins*, 365 F.2d 559 (4th Cir.) (per curiam), *cert. denied*, 385 U.S. 949 (1966); *Richburg v. South Carolina*, 257 F. Supp. 468 (D.S.C. 1966); *Alabama v. Means*, 256 F. Supp. 437 (N.D. Ala. 1966).

²⁵⁸ See notes 238-49 *supra* and accompanying text.

²⁵⁹ See notes 183-202 *supra* and accompanying text.

²⁶⁰ See notes 205-19 *supra* and accompanying text.

²⁶¹ 384 U.S. at 833.

change in the relationship between the courts of our dual judicial system; and (2) whether additional withholding of cases presenting federal civil rights issues would encourage increased responsibility on the part of the state courts.²⁶² The Court, implicitly responding in the negative to the above queries, declared its intention to remain within the spirit of the *Strauder-Powers* decisions by refusing to allow the removal remedy to work a wholesale dislocation of cases from the state to federal courts.²⁶³ The Court apparently feared that any increase in removable cases would contribute to unwarranted congestion in the federal courts²⁶⁴ and disrupt the states' judicial machinery by the exploitation of the removal remedy as a delaying tactic.²⁶⁵ The Court felt that additional remedial avenues, such as injunction and appeal to the Supreme Court, were adequate to correct denials not protected by the removal procedure.²⁶⁶

²⁶² *Id.* at 834. See *Baines v. City of Danville*, 357 F.2d 756, 768 (4th Cir.), *aff'd mem.*, 384 U.S. 890 (1966).

²⁶³ "But we decline to repudiate [the *Strauder-Powers*] . . . decisions, and we decline to do so not out of a blind adherence to the principle of *stare decisis*, but because after independent consideration we have determined . . . that those decisions were correct in their basic conclusion that the provisions of § 1443 (1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law." *City of Greenwood v. Peacock*, 384 U.S. 808, 831 (1966).

²⁶⁴ *Peacock* noted that in the fiscal year 1963 there were 14 criminal removal cases in the whole country while in fiscal 1965 this number had risen to 1,079 in the Fifth Circuit alone. 384 U.S. at 832; see *Georgia v. Rachel*, 384 U.S. 780, 788 n.8 (1966). It may be noted, however, that in the rest of the nation there were only 113 such cases in fiscal 1965. Annual Report of the Director of the Administrative Office of the United States Courts 214, 216 (1965). See generally Olney, *An Analysis of the Docket Congestion in the United States District Courts in the Light of Enactment of the Omnibus Judgeship Bill*, 29 F.R.D. 217-18 (1963); Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963); Note, 51 VA. L. REV. 950, 967 & n.72 (1965).

²⁶⁵ Once a removal petition is filed in the federal court, all state court proceedings are stayed unless and until the case is remanded by the federal district court. 28 U.S.C. § 1446 (e) (1964). Since the petitioner is allowed to file his removal petition up to the time of the impaneling of the jury, the opportunity for calculated delay is present. See 43 N.C.L. REV. 628 (1965). Unfortunately, the Supreme Court in neither *Rachel* nor *Peacock* outlined guidelines for determining the sufficiency of a removal petition so as to discourage such practice.

²⁶⁶ *City of Greenwood v. Peacock*, 384 U.S. 808, 828-30 (1966). *Peacock* listed various remedies available in the federal courts to correct any wrongs perpetrated by a state's law enforcement and judicial machinery: (1) injunction, see *Dombrowski v. Pfister*, 380 U.S. 479 (1965); note 237 *supra*; (2) setting aside convictions because of complete absence of evidence against the accused, see *Thompson v. Louisville*, 362 U.S. 199 (1959); (3) rectifying the inadequate fact-finding process of a state's judicial system, see *Townsend v. Said*, 372 U.S. 293 (1962); and (4) a writ of habeas corpus, see *Fay v. Noia*, 372 U.S. 391 (1963); note 255 *supra* and accompanying text. 384 U.S. at 828-30. See generally Wilson, *supra* note 255; Note, *Developments in the Law—Injunction*, 78 HARV. L. REV. 994 (1965).

Initially, the Court's preoccupation with federalism may seem strangely incongruous with the Court-sanctioned aggrandizement of federal power in many other areas²⁶⁷ and with its sympathetic approach toward civil rights issues in recent years.²⁶⁸ Nevertheless, as to the civil rights aspect in particular, two factors militate against characterization of the *Rachel-Peacock* decisions as aberrational. In the first instance, dissent from within the Court has foreshadowed a more cautious approach to civil rights problems;²⁶⁹ and *Adderly v. Florida*,²⁷⁰ decided subsequent to *Rachel* and *Peacock*, is further indicia of this trend. Secondly, the textual obfuscation created by the antipathetic mandates of the statute does not readily facilitate an expansive interpretation of the removal procedure.²⁷¹ Unfortunately, the Court further complicated the situation by seizing upon the fortuitous phraseology of particular federal civil rights legislation, an approach which does not contribute to a systematic scheme for the efficacious protection of federal rights.

Thus, in view of the restrictive position taken by the Supreme Court in *Rachel* and *Peacock*, the task of resuscitating the removal remedy has apparently fallen to Congress. Any such reformation should produce a removal procedure whose implementation effectively confronts the exigencies of contemporary conditions²⁷² under

In rebuttal, the dissenting opinion noted instances in which unwarranted prosecutions and convictions in state courts were in the process of appeal as long as four years before reversal by the Supreme Court. 384 U.S. at 845 & n.11 (Douglas, J., dissenting). See Amsterdam, *supra* note 236, at 798 & n.18.

²⁶⁷ See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). See generally Lloyd, *The Supreme Court of the United States: Center of Conflict*, 17 SYRACUSE L. REV. 599 (1966); Murphy, *The Supreme Court and Democratic Theory*, 17 SYRACUSE L. REV. 642 (1966); Comment, 1966 DUKE L.J. 142; Note, 46 B.U.L. REV. 375 (1966).

²⁶⁸ See *United States v. Guest*, 384 U.S. 745 (1966); *Harper v. Board of Elections*, 383 U.S. 663 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁶⁹ See *Harper v. Board of Elections*, 383 U.S. 663, 670 (1966) (Black, J., dissenting); *id.* at 680 (Harlan, J., dissenting); *Brown v. Louisiana*, 383 U.S. 131, 151 (1966) (Black, J., dissenting); *Cox v. Louisiana*, 379 U.S. 559, 575 (1965) (Black, J., dissenting); *id.* at 585 (Clark, J., dissenting); *Hamm v. City of Rock Hill*, 379 U.S. 306, 318 (1964) (Black, J., dissenting); *id.* at 322 (Harlan, J., dissenting); *id.* at 327 (White, J., dissenting); *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (Black, J., dissenting); *Lombard v. Louisiana*, 373 U.S. 267, 248 (1963) (Harlan, J., dissenting).

²⁷⁰ 385 U.S. 39 (1966) (criminal trespass convictions of civil rights demonstrators affirmed, 5-4).

²⁷¹ See text accompanying notes 179-82 *supra*.

²⁷² See generally U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT (1965); U.S.

which the methods of denying rights are infinitely more subtle than enactments of facially discriminatory state laws.²⁷³ Since the procedure should probably be limited to before-trial invocation to avoid unnecessary friction between state and federal courts,²⁷⁴ a future removal statute should articulate guidelines capable of flexible application which would allow a federal court to rule expeditiously on removal petitions so as to avoid congestion in the federal courts and to discourage utilization of the procedure as a dilatory tactic. Generally, these standards for removal would function by permitting removal to the defendant who before trial can offer demonstrative evidence of a substantial likelihood that alleged future denials in the state court will materialize.²⁷⁵ Such evidence might focus upon the past performance of the particular court in dealing with civil rights cases²⁷⁶ and upon pre-trial prejudice, whether expressed in the form of adverse publicity²⁷⁷ or deep-seated, hostile attitudes toward a

COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: THE FIRST MONTHS* (1965); Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEXAS L. REV. 492 (1965); Broeder, *The Negro in Court*, 1965 DUKE L.J. 19; Hamilton, *Southern Judges and Negro Voting Rights: The Judicial Approach to the Solution of Controversial Social Problems*, 1965 WIS. L. REV. 72; Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965); Note, 71 YALE L.J. 537 (1962).

²⁷³ See generally U.S. COMM'N ON CIVIL RIGHTS, *LAW ENFORCEMENT* (1965); Morse, *Civil Rights Removal: "The Letter Killeth, But the Spirit Giveth Life,"* 11 HOW. L.J. 149, 173 (1965).

²⁷⁴ In regard to the friction between state and federal courts often generated by procedural devices such as the removal remedy and the federal writ of habeas corpus, one federal district court judge has stated: "The removal of an action from a state to a federal court may sometimes cause ruffled feelings, but few judges remain long offended at being relieved of trying a lawsuit. On the other hand, when a federal judge reverses a state judge who has been affirmed by the state appellate courts, forcing him to retry the case or free the accused, the sensibilities of even the most ardent supporter of our dual system of federal and state government are tested." Wilson, *supra* note 255, at 741.

²⁷⁵ See generally Amsterdam, *supra* note 236, at 908-12; Johnson, *supra* note 250, at 149-55; Morse, *supra* note 273, at 175-86; Note, 51 VA. L. REV. 950, 971-72 (1965).

²⁷⁶ To evaluate the past performance of state courts relative to claimed denials of equal civil rights, inquiry might be made into alleged (1) patterns of systematic disqualification of grand or petit jurors on the basis of race or color, (2) racial discrimination in regard to a state's services and facilities relating to the administration of justice, (3) inequality of punishments for the same crime on the basis of race or color, and (4) unequal terms of bail or conditional release on the basis of race or color. Recent Congresses have considered numerous proposals embodying the foregoing principles. See S. 2923, H.R. 12807, H.R. 12818, H.R. 12845, H.R. 13500, H.R. 13941, H.R. 14836, H.R. 14770, 89th Cong., 2d Sess. §§ 201-04 (1966); H.R. 14112, H.R. 14113, 89th Cong., 2d Sess. § 301 (b) (1966). See also S. 3170, H.R. 14775, 89th Cong., 2d Sess. § 3 (1966); H.R. 7702, 88th Cong., 1st Sess. §§ 901-03 (1963).

²⁷⁷ See note 252 *supra*.

particular class.²⁷⁸ In this manner, implementation of a meaningful removal remedy would significantly contribute to the extension of the equal protection of the laws to all citizens.

h.m.j.

²⁷⁸ See 110 CONG. REC. 6955 (1964) (remarks of Senator Dodd); note 250 *supra*.